UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS - SPRINGFIELD

IN THE MATTER OF:	.	Case #08-12540
	.	
THE EDUCATION RESOURCES INSTITUTE, INC.	.	Springfield, Massachusetts
	.	**July 12, 2010**
Debtor.	.	1:14:31 p.m. O'clock

TRANSCRIPT OF TELEPHONIC HEARING ON:
STATUS CONFERENCE;
(#1103) JOINT MOTION OF DEBTOR AND CREDITORS' COMMITTEE TO MODIFY FOURTH AMENDED PLAN OF REORGANIZATION;
(#1106) MOTION OF TCF NATIONAL BANK TO APPROVE STIPULATION OF ACCEPTANCE OF PLAN;
(#1120) JOINT MOTION FOR ORDER AUTHORIZING DEBTOR, RBS CITIZENS, N.A., AND CREDITORS' COMMITTEE TO ENTER INTO AND PERFORM AMENDED STIPULATION FOR THE SETTLEMENT OF GUARANTY CLAIMS RELATING TO THE TERMINATION OF CERTAIN LOAN GUARANTEES;
BEFORE THE HONORABLE HENRY J. BOROFF, J.U.S.B.C.

APPEARANCES:

For The Debtor: DANIEL GLOSBAND, ESQ.
GINA L. MARTIN, ESQ.
Goodwin Procter, LLP
Exchange Place
Boston, MA 02109
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Electronic Sound Recording Operator: Laura L. Chambers

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EXHIBIT 1

Page 2 Cover
#08-12540
7-12-2010

APPEARANCES: (continued)

For the Official Committee of Unsecured Creditors:	JEFFREY D. STERNKLAR, ESQ. Duane Morris 470 Atlantic Avenue Boston, MA 02210
For First Marblehead Corp. and First Marblehead Data Services, Inc., Trust Administrator:	DENNIS L. JENKINS, ESQ. JOHN D. SIGEL, ESQ. Wilmer Cutler Pickering Hale & Dorr, LLP 60 State Street Boston, MA 02109
For U.S. Bank, N.A.: Indenture Trustee for Student Loan Trusts:	RICHARD C. PEDONE, ESQ. Nixon Peabody, LLP 100 Summer Street Boston, MA 02110
For Nellie Mae Education Foundation:	D. ROSS MARTIN, ESQ. Ropes & Gray, LLP One International Place Boston, MA 02110
For Official Committee of Unsecured Creditors:	DAVID J. REIER, ESQ. Posternak, Blankstein & Lund, LLP 800 Boylston Street Boston, MA 01299

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Page 3 Cover
#08-12540
7-12-2010

APPEARANCES: (continued)

For Pension Benefit Guaranty Corporation :
SAMUEL C. BATSELL, ESQ.
U.S. Government Agency
1200 K Street N.W. Suite 340
Washington, D.C. 20005

For Ambac Assurance Co.:
JAMES W. KAPP, III, ESQ.
McDermott, Will & Emery
227 West Monroe Street
Chicago, IL 60606

For RBS Citizens, N.A.:
PAUL S. SAMSON, ESQ.
Riemer & Braunstein, LLP
Three Center Plaza
Boston, MA 02108

For the U.S. Trustee:
ERIC K. BRADFORD, AUST *(Phone)*
Office of the U.S. Trustee
J.W. McCormack Post Office, Court House
5 Post Office Square Suite 1000
Boston, MA 02109

For GMAC Bank:
VANESSA PECK, ESQ.
Goulston & Storrs
400 Atlantic Avenue
Boston, MA 02110

Electronic Sound Recording Operator: Laura L. Chambers

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MR. REYNOLDS: All rise.

THE COURT: Good afternoon. Please be seated.

MR. REYNOLDS: Case #08-12540, The Education Resources Institute. A status conference on the case, as well as hearings on the joint motion of the debtor and the Creditors' Committee to modify the fourth amended plan of reorganization; a joint motion for an order authorizing the debtor, RBS Citizens, and Creditors' Committee to enter into and perform an amended stipulation; and a motion of TCF National Bank to approve the stipulation.

Beginning with Mr. Glosband, could I ask counsel present to please identify themselves for the record as well as who they represent.

MR. GLOSBAND: Good afternoon, Your Honor. Daniel Glosband from Goodwin Procter representing TERI.

MS. MARTIN: Good afternoon, Your Honor. Gina Martin from Goodwin Procter representing the debtor, TERI.

MR. STERNKLAR: Good afternoon, Your Honor. Jeffrey Sternklar on behalf of the Unsecured Creditors' Committee.

MR. REIER: Good afternoon, Your Honor. David Reier, Posternak, Blankstein & Rome (low volume, not near a microphone, unclear.).

MR. PEDONE: Good afternoon, Your Honor. Richard Pedone representing U.S. Bank as Indenture Trustee.

MR. KAPP: Good afternoon, Your Honor. Jay Kapp

representing Ambac Assurance Corporation.

MR. JENKINS: Good afternoon, Your Honor. Dennis Jenkins and John Sigel for the First Marblehead.

MS. PECK: Good afternoon, Your Honor. Vanessa Peck representing GMAC.

MR. BATSELL: Good afternoon, Your Honor. Sam Batsell representing Pension Benefit Guaranty Corporation.

MR. SAMSON: Good afternoon, Your Honor. Paul Samson representing RBS Citizens, NA.

MR. MARTIN: Your Honor, Ross Martin, Ropes & Gray. (unclear, not near microphone, cannot hear him) and (unclear name) is representing the Nellie Mae Education Foundation.

THE CLERK: And, Mr. Bradford, on behalf of the United States Trustee, do we still have you on the phone?

MR. BRADFORD: You do. Good afternoon, Your Honor, Eric Bradford for the U.S. Trustee. Thank you for allowing me to appear by phone today.

THE COURT: You're welcome.

How's it going?

MR. GLOSBAND: What did he say?

MS. MARTIN: "How's it going?"

MR. GLOSBAND: I'm about to find out, aren't I? I ask Your Honor first if you would like to proceed with the modification motion first or with TCF and Citizens' motions first?

THE COURT: I'll let you decide.

MR. GLOSBAND: Pardon?

THE COURT: I'll let you decide.

MR. GLOSBAND: In that case, I will proceed with the modification motion.

As I suspect you know, I thought that we were substantially finished with plan related matters when we left here on April 28th. I am disappointed that we're back, but with a case as complicated as this case has been, I'm not totally surprised that we're back.

Understanding the complexity of the case, although not necessarily different from other cases in this regard, we provided in the plan that we could modify the plan, if necessary, to correct a defect or any inconsistency.

The ability to modify a plan is also contemplated by Section 1127 of the Bankruptcy Code. So this is clearly not the first time this has ever happened either to me or under Chapter 11.

From the perspective of the context of this modification, I think it's worth noting, although perhaps it's self evident, that the debtor and the Creditors' Committee are of like mind on the issues before the Court today. And while there are parties who are not of like mind, the general body of creditors and the debtor are on the same side.

Before I go into a full but abbreviated exposition,

I would ask the Court if you wish to give us a preliminary sense of whether you believe at the end of the day on April 28th we had a confirmed plan or the plan is still pending confirmation. I'm prepared to proceed in either event or in the alternative.

THE COURT: I certainly will listen to anyone who wishes to argue differently. But it's my strong inclination that until I sign a confirmation order, there is no confirmation.

MR. GLOSBAND: Thank you. I will proceed along those lines, but I'll address briefly post-confirmation modifications as well, because I think the way we've presented this, we should be able to modify our plan either way.

We've pretty much flooded you with paper, and I don't want to repeat all of that. I'm going to try to do a short version of the problem and our proposed solution to the problem, and stay out of detailed factual contentions in either direction if I can do that. And if at the end of today's hearing we need to get into factual details, you'll tell us, and we will.

The plan proponents, being the debtor and the Committee, understood when they presented the plan that there was a limited universe of pre-petition defaulted loans and a limited universe of cash that was going to go back to the securitization trusts, and there was an alternative universe,

if you will, that was going to be transferred to the plan Trustee.

All of our arithmetic and analysis was premised on our understanding of that universe. And the universe in respect of the pre-petition loans was confined to those loans that had been purchased from collateral in pledge accounts held by TERI, TERI's assets, TERI's collateral securing its obligation to honor its guarantee in the event that a loan defaulted.

When pledge account money ran out, TERI still had a guarantee obligation, and prior to April 2008 had the money to honor that obligation and did so from its general operating account funds.

Under the documents between the parties, lenders and the securitization trust in particular retained a security interest in recoveries on defaulted loans that had been purchased with pledge account collateral, subject to all of the issues raised in the trust adversary proceeding, but at least under the documents in the first instance they had that security interest. They had no security interest under the documents in loans purchased with TERI's operating accounts. So our focus was on their collateral and what of their collateral they were to get back subject to the settlement of the trust adversary proceedings.

The cash component of the issue -- and let me just

digress in case it's not vividly apparent from the papers. The loan component of this issue involves 34 million dollars in face amount of loans that were purchased by TERI pre-petition using its general operating account funds, out of a larger universe of about 364 million dollars face amount of loans that TERI had purchased in the aggregate.

In respect of cash, TERI and the plan proponents, for different reasons it turns out, thought that about three million dollars in recoveries collected just prior to the bankruptcy date on account of loans purchased with collateral pledge account proceeds was going to be returned to the trusts.

TERI's position was based on the fact that it thought that the trust had an arguable security interest in those recoveries that lasted for 21 days before it lapsed based on commingling. And without getting into the details of the argument, all recoveries went into a single account, that account was swept every night, we think 21 days is the longest that the security interest should last. So we were counting on turning over around three million dollars in that 21-day category.

The Committee, and they can speak for themselves, thought that, no, what we were doing was giving back about three million dollars in recoveries, and recoveries includes payments for what are called rehabilitative loans. We turn

back a loan, they turn over cash, based on a questionnaire that they had submitted to First Marblehead that First Marblehead had answered, saying how much in pre-petition rehabilitative loans and recoveries wasn't put into the pledge accounts, how much was floating at the time we filed the case, almost the same amount of money, around three million dollars.

So we came into the hearing on April 28th with a plan premised on the economics that I've just described.

THE COURT: That three million is separate from 34 million?

MR. GLOSBAND: Correct. Thirty-four million is the face amount of loans. There's arguments over how much the present value of the collections on the loans -- the --

THE COURT: That were purchased by TERI's operating account, from funds in TERI's operating account.

MR. GLOSBAND: Correct.

THE COURT: Three million dollars is this amount that is either subject to delayed perfection or on account of float.

MR. GLOSBAND: Correct.

THE COURT: Okay.

MR. GLOSBAND: But those are the two categories of assets that are in dispute.

And as I said, our economic analyses, including the best interest test, including Mr. Peko testimony and

affidavit, including Mr. Renzi's affidavit, and all of the numbers in Schedule B to the plan which laid out what the securitization trusts were getting by way of claim, what the trust adversary proceeding settlement adjustment was, all of those numbers were premised on the plan trust and not the securitization trusts getting those 34 million dollars in loans and what turns out to have been six million dollars in cash.

And, frankly, I guess because we had internalized that information, we thought the plan and the disclosure statement provided for that, and we thought the parties understood that; certainly the economics displayed that.

Subsequent to the April 28th confirmation hearing, we discovered that at least some of the parties didn't read things the way we did. And it's become clearer as time has gone on that Ambac, the Indenture Trustee, and First Marblehead on behalf of someone, and I'll come to that issue later, all take the view that no, no, those loans and that money were to go to the securitization trusts. And you can tell from their objections that they feel strongly about the issue.

I want to just digress for one second to explain the 6.2 million dollars in cash because it will come up in a couple of respects.

As I said, we understood that there was three

million dollars in cash that was to go to the securitization trusts. The 6.2 million dollars emanates from what was supposedly a reconciliation of historically inaccurate remittances that turns out was reflected in an October e-mail that's attached to one of the objections, but it really wasn't in the front of anyone's mind and had nothing to do with contemporaneous collections and frankly never surfaced as an issue until this issue came up after the confirmation hearing.

You may hear from others that they asked about whether we had set aside the money to be returned to the securitization trusts, and my answer to that was Yes, but those numbers were never fully reconciled, and we never sat down until after the fact and discovered that they thought there was 6.2 million dollars more in those numbers derived from this reconciliation as opposed to the near term collection.

So that's kind of the context of the issue, and I'm sure others will have a different view of it, but I just wanted to make sure that there was a bit of an explanation in front of Your Honor.

So where we come down to is that the plan that was presented for confirmation on April 28th, is subject to two conflicting interpretations with respect to these issues. And if the plan were interpreted as suggested by the objecting parties, then in our view it wouldn't be confirmable. First

of all, none of our evidence supported a plan with that interpretation. Second of all, that would be discrimination among the treatment of the class of unsecured creditors because some of them would have had their claims calculated on different assumptions than others.

And most importantly, that plan as interpreted in their way wouldn't be feasible because if TERI had to part with an additional 6.2 million dollars in cash, under the adjustment mechanisms in the plan it basically would have negligible to no cash with which to operate. Best case it would be $200,000, I think,; worse case it would be a negative number.

So the record on April 28th simply does not support confirming a plan as interpreted by the objecting parties. So when we concluded that we had this problem, we decided that our, you know, our one and only alternative was to modify the plan. Notwithstanding some of the tenor of the paperwork, this was not anything surreptitious on our part. It happened because we discovered that there was a misinterpretation, or at least disagreements in interpretation. Without getting into any of the background facts, the plan that we submitted interpreted our way was perfectly confirmable, interpreted their way is not confirmable. And so to fix that, we proposed the modifications that are described in our pleadings.

The reason we think the plan has to be modified,

unless the Court were to interpret it to say -- interpret it our way and I so rule -- and we don't want to put you in that position -- is so that there's no ability to equivocate about how it's to be interpreted, and to make very clear that in respect to these two issues and a couple of minor ones that I'll mention, the plan comes out the way that almost everybody thought it did.

The way -- ways in which we would implement the modifications are as follows: We would fix the definition of "securitization trust collateral" so that it's clear that it only relates to a fixed amount of cash and to loans purchased with pledge account collateral.

We would increase the unsecured claim of the securitization trusts by 6.2 million dollars. Let me explain why. At the time that the economic analysis of the plan was being performed and the decoder was being developed and applied, neither Grant Thornton nor FDI were aware of the fact that there were supposedly 6.2 million dollars in loan recoveries that had come in between sometime in 2006 and thereafter, and so their understanding of the loans was that there was that 6.2 million dollars along with other recoveries still to be recovered.

So they basically didn't adjust the decoder to reflect the fact that that money had already come in and wasn't going to come in later. Which meant that the claims of

the affected securitization trusts were too low, because they anticipated they'd be getting more money.

So we propose to fix that by basically adjusting their claims to reflect the fact that they're not going to get that money in cash.

So that's the second modification. The first is fix the definition, the second is correct the fact that we didn't realize that the 6.2 million had been paid starting in 2006.

And those are really the modifications that address the two significant issues. There are some further modifications that are of less significance, but I'd like to talk about them briefly.

One is that we have been unable to fully and accurately account for the allocation of funds in what's called the segregated account. At the time that the Court authorized and directed TERI in June of 2008 to repurchase loans from pledge accounts of securitization trusts that wanted to submit them, as part of that order there was a direction that recoveries on pre-petition defaulted loans which were being collected by First Marblehead would be turned over to TERI and held in a segregated account, and that account then also became the location for recoveries on post-petition defaulted loans, what we've been calling the Section 552 loans that are to go to the plan trust.

And First Marblehead has filed a -- let me back up.

In our initial modification, we weren't confident that the allocation among trust issue was limited to just the segregated account. Between then and now we've become confident of that.

First Marblehead filed a limited reply to our reply dealing with the issue of that allocation, saying we had this information, we had that information, we have loan level details. We agreed in October of 2008 that we received everything we were supposed to get in the way of data from First Marblehead, which is kind of beside the point because we're talking about recoveries after that date and recoveries on loans that they're still collecting.

The bottom line is we have pretty much everything they said we have. What we don't have is really a small item, but it's big enough to prevent our allocating the segregated account. And that is we don't have an allocation of court costs deducted from the remittances of the recoveries that go into the segregated accounts. And our personnel have sort of asked for that, they've been temporized on the other side. We can't seem to get that information. It's a roughly $500,000 item, but there's no way to know just how much money should go back to a particular securitization trust if we don't know what that trust has incurred by way of court costs. We could do it on a *pro rata* basis, but that --

THE COURT: By court costs you mean --

MR. GLOSBAND: -- that wouldn't be accurate.

THE COURT: -- attorneys' fees? By court costs, you mean attorneys' fees?

MR. GLOSBAND: Sorry, what?

THE COURT: By court costs you mean attorneys' fees?

MR. GLOSBAND: No, I don't think so. The way that I understand the collection process works, and it worked a little differently before the petition date, attorneys' fees are netted from recoveries. And so that's kind of an automatic. When you get a recovery in respect to a particular loan, you know it's net of the court costs, you don't need a further adjustment -- excuse me, of the attorneys' fees.

Prior to the petition date, the collection agencies would invoice TERI for court costs, and TERI would pay them. So TERI would know how much in court costs related to a particular loan.

When the petition was filed and First Marblehead remained responsible for collections, it authorized the collecting agencies to deduct the court costs, but they did it on a bulk basis, and we are unable to allocate it. But I believe it's such things as filing fees and the like. And in the aggregate it's not a huge number, but as soon as we get an allocation of that number, we can also pass out the segregated account. So that's the third modification.

There are a couple of other minor ones. The first

is that in light of at least the plan proponent's view of the circumstances that led to these problems, they've decided that with respect to First Marblehead related entities, there should be two changes made in the plan.

The first is that First Marblehead Corporation or FMER, and I'm not sure which it was, which was going to be on the Plan Trust Advisory Committee should not be on the Plan Trust Advisory Committee. And secondly, FMDS, First Marblehead Data Services, which was the trust administrator which was to be exculpated under the original draft of the plan, the Committee in particular has decided should no longer be exculpated. So those two changes have been made to remove those provisions.

Next, to accommodate the modifications, the deadlines in the plan for voting acceptance and for confirmation have been extended out to the end of August collectively. And Mr. Sternklar may address this in more detail.

And then finally the settlements that the Court approved at the time of the last hearing with the PBGC and MBIA, which were separate from the plan, have now been incorporated in the plan, to just sort of neaten things up.

So a couple of more points and then I'll cede the podium.

There's quite a lot of, you know, noise in the

objections about whether we have, whether the plan proponents have the right to modify the plan. If Your Honor retains his conclusion that the plan hasn't been confirmed yet, I believe that absent some sort of egregious bad behavior we have the ability to modify the plan as of right under Section 1127(a). And even if we didn't, I believe the circumstances that I've described would warrant our modifying it under Section 1127(b).

The issues raised in the objections about baiting and switching, and, you know, reliance and the like, really aren't the issues. We've determined that there's a defect, and we need to correct that defect, and the cases would permit us to do that, notwithstanding the peripheral issues raised by the objecting parties.

In the context of the modification, we also have the issue of disclosure and process and how that's to be addressed. And we're very receptive to the Court's views on disclosure and process, but let me at least suggest what ours are.

We believe first that, as demonstrated in the exhibits to our modification motion, the modifications really only adversely affect three parties, and those are three securitization trusts. They're the trusts that -- the master trust that Ambac is the control party for, and they're trusts 2003 and -- 2003-1 and 2004-1. And they're affected if they

believed and relied on their interpretation of the plan, and we change that interpretation, because they're the ones who were getting among them the 34 million dollars in loans.

THE COURT: First Marblehead is not adversely impacted?

MR. GLOSBAND: First Marblehead is a large but unsecured creditor. And if the modification is to either enforce the plan as we interpreted it or to correct a situation where substantial value would be going to other parties, First Marblehead benefits from the modification, because the return to creditors is better under the originally interpreted/modified plan than it would be under the plan as interpreted by those other parties. So it's --

THE COURT: It's a removal of the exculpation. Is that not a detriment?

MR. GLOSBAND: That's First Marblehead Data Services, and I suppose, yes, they could -- they're affected by that and they have a right to argue that effect. I wouldn't dispute that.

In terms of the Plan Trust Advisory Committee, I would think that's a neutral. I don't think that's an adverse effect.

So as to creditors other than these three trusts, if you view the effect on them as just the allocation of this additional 6.2 million dollars in claim, there is a dilution

of a per cent or so in what their estimated recovery would be based on the numbers in the liquidation analysis. If you view the effect on them as avoiding the loss of these assets, it's a plus to them. So I don't think as to any creditor other than those trusts there's any way to say that they are materially and adversely affected.

The objecting parties pointed out that our initial modification, where we propose to defer distribution of all pledge account collateral, would be an adverse effect on all of the trusts, and we would agree with that, but we've eliminated that problem because we'll be passing out two hundred and some odd million dollars and holding back, I think it's 16 or so to get it allocated. So it's hard to see that that's a material adverse effect in that context. So I think we've remedied the only thing that I could see might have been an adverse effect on, other than the three trusts.

Lastly, in terms of process, notwithstanding the fact that the plan proponents think that only three creditors can argue that they're suffering a material and adverse effect, we are prepared to nonetheless allow all of the securitization trusts an opportunity to reconsider their votes, if they wish. The objections have argued that all of them are negatively affected. We disagree with that. But rather than getting lost in a process fight, we simply propose that we would give them all the opportunity to reconsider

their votes.

And the notice package that we initially proposed, we would augment. We initially proposed circulating the modification motion modified black-line plan, and we would add to that now a reply pleading and we would add an offer, if you will, to the creditors if they want, for us to circulate the objections, although there's a lot of paper there and if the creditors don't want them, it seems like an unnecessary waste.

We would also propose that the process be generally similar to that to which we agreed in the context of the original plan with respect to the trust note holders. In other words, we would -- even though trust note holders are not our creditors, instead the trusts are and the Trustee perhaps as their emissary, in the initial process we accommodated their request that we structure a voting process for trust note holders, so that they could instruct the intermediaries -- you never know who those people are, but they are processed through intermediaries. They send their ballots to the intermediaries, and the intermediaries pass along the voting information to the Indenture Trustee.

We would go through that same process and allow trust note holders to change their votes, if they wish, by basically conveying the vote change instruction to our claims agent, Epic, with enough detail so that Epic can match it against the intermediary vote and redo the arithmetic. So

that's the process that we would propose.

We think that in this context, the disclosure that we're suggesting is, if not more than sufficient, certainly sufficient. The modifications are clearly delineated in the black-lined plan. The modifications are described, and maybe over-described between our motion to modify and our reply, and if anyone has any doubts we can also include the objections.

And I would note that we're not dealing with a universe of unknown, faceless trade creditors. For the most part, we're dealing with sophisticated parties who have been very actively involved in this case. In particular, the three trusts that are adversely affected are actively represented in the room, and have been involved in this process since we discovered the problem. And it's hard to see how any more disclosure would benefit their decision to accept or reject the modified plan.

As to the note holders, as I've said, I think our papers are clear. And there's certainly no need to solicit creditors outside the trust universe. They're only affected beneficially by the modifications.

Notwithstanding the protestations and the objections, there is no requirement in this kind of a situation for starting the whole process over, producing a new plan and a new disclosure statement and having that heard and approved and circulated. The Court can determine that

disclosure is sufficient in light of the audience, and the audience is the one that I've described, not an unsophisticated audience, an audience that's totally up to speed on this -- this process already. To the extent that individual note holders aren't, they will be when they see our modifications. There seems very little need to address issues that are beyond just the confines of the modifications themselves.

The last topic I want to address is the standing of First Marblehead with respect to most of its objections. And FMDS, the one party that's affected by the exculpation, joined the indenture banks' objections as plan administrator, and in that regard I don't dispute their standing.

But First Marblehead Corporation and First Marblehead Education Resources filed a long, and I would say quite outspoken objection, arguing only one issue that I think could affect creditors generally, and that is the cost and delay of the modification process might outweigh the benefit, and that's not I think a relevant issue. We're stuck in a situation where we have to modify. We don't want to have any more cost or any more delay than we possibly need. But we do have to go through the modification process. We just don't have an alternative. So that I think is a non-issue.

Everything else they argue is an issue that they argue on behalf of the securitization trusts for whom they do

not speak. Issues that affect the securitization trusts do not affect them in their capacity as a creditor in this case, and they don't purport to file the objection in any other capacity.

And so from a prudential standing perspective, and that's a perspective honored in Bankruptcy Courts, including in this Court, including in the First Circuit, they're arguing issues that aren't their issues. They're arguing a third party's issues, and they don't have standing to do that.

So that's pretty much my view of things, Your Honor. As I say, I'm not -- happy as I am to see you, I'm not thrilled to be here under these circumstances. And, you know, nonetheless, we are doing what we think is the necessary thing and the right thing and the thing that comports with the expectations of almost all of the parties in this case and that remedies a defect that we discovered in our plan.

I'm going to cede to Mr. Sternklar, who I think may have a few additional comments.

THE COURT: Okay.

MR. STERNKLAR: Thank you, Your Honor. Jeffrey Sternklar for the Creditors' Committee.

We join with the debtor in seeking to modify this plan to carry out what has always been our sincerely held intentions, and to remedy an obvious defect in that the, as the objecting parties have so vociferously pointed out, the

plan doesn't mean what we intended, and it has to be fixed. We're not changing the deal, we're simply trying to implement it.

Mr. Glosband outlined the changes to the motion -- to the plan. I obviously won't belabor it. I just want to highlight one point on the recoveries of the three million dollar issue.

The bid ask, if you will, is really close to 9.2 million as opposed to three million. And the way you get there is, our view is it's three million dollars, based roughly two and a half million dollars for proceeds of recoveries and roughly half a million dollars for -- proceeds of rehab, excuse me, and half a million dollars for recoveries that TERI collected in the few weeks before bankruptcy.

The other side says, "Well, you're right on the two and a half million for the rehabs, but you're wrong on the half million recoveries; that's really another 6.2 million." So 2.5 plus 6.2 they would say is 9.7 million. So that's the spread we're dealing with. It's not just the difference between three million or six million, it's that brackets where the two sides are on that point.

With respect to the changing to the timing of release of the segregated recoveries account, Mr. Glosband I think correctly outlined the issue. We're aware of that we need additional information. First Marblehead has made it

abundantly clear they don't intend to provide it. We suspect we'll be filing a motion for a 2004 exam shortly if we can't resolve it, and we'll get the information that way.

With respect to First Marblehead and the removal of FMDS from the exculpation provision and its participation on the Plan Trust Advisory Committee, it's not punitive and it's not simply spite. What the facts that led up to this has revealed is the inherent conflict that First Marblehead is in. On the one hand, it's an unsecured creditor, the FMC. On the other hand, it's clearly looking out for the interest of the securitization trust on their secured claims as well as their unsecured claims, as administrator.

You know, there are potential claims that are reserved through the plan against First Marblehead, things like claims for alter-ego, claims that they breached their fiduciary duty, claims for negligence, claims for contract breach. What they highlighted to us was that they couldn't serve on this Committee given their conflicted position. And that was really -- when we saw all this, given how we got to where we are, it was clear that --

THE COURT: This wasn't -- it wasn't clear to you in April?

MR. STERNKLAR: No, it was not. We thought we had aligned the interests, and it became clear afterwards.

With respect to your question to Mr. Glosband about

whether First Marblehead is adversely affected by the plan, to the extent that question was in the context of evaluating whether First Marblehead should be entitled to change its vote as an affected party, the short answer is First Marblehead didn't vote. So there's nothing for them to change.

So whether they're adversely affected or not, for purposes of Rule 3019, and whether they should have a right to change the vote is not at issue here. This isn't a do-over where we're just going to re-vote. 1127 says you talk about changing a pre-existing vote, and the case law is clear. If you didn't vote, you don't now get a chance to submit a new vote, or a first vote.

As I see the decision tree here, Your Honor, this is the preliminary hearing. I believe that we requested in a motion, and the first issue is whether the plan has been confirmed, and with Your Honor's permission I won't belabor whether circumstances warrant under 1127(b), I view that more as rebuttal to the contention that the plan has been confirmed. And with Your Honor's permission, I'll reserve that if Your Honor wishes to hear it after hearing the contrary argument.

If the plan has been confirmed, then the question is who gets to change their vote. As Mr. Glosband said, we will accept for argument's sake the contention of the securitization trusts that they're all adversely affected, and

of the objecting parties those that voted would have an opportunity to change their vote, should they choose to do so.

We don't believe changing the vote ultimately affects confirmability of the plan. We will have impaired classes voting to accept. We think that it really only goes to whether they opt in or opt out of the settlement. So it affects what happens after confirmation. But it doesn't, in our view, affect the confirmability of the plan.

The Court would then need to decide if, as we requested, the pleadings provide adequate disclosure. Under 1125, ***American Solar King***, the case we cited throughout our materials, stated that 1127 does not require a brand new disclosure statement, nor is that common practice in pre-confirmation modifications that require brand new disclosure statements, particularly as Mr. Glosband noted where as here the only parties changing their votes and the only parties who would need information to decide whether to change their votes are the objecting parties who, if nothing else, clearly have demonstrated they're sophisticated and have all the information they could possibly need. Indeed, it appears they've already decided, but we'll see.

Your Honor will need to schedule a final hearing after setting a deadline under Rule 2002(a)(5) for affected parties to change their vote. If the Court's calendar can accommodate us, we would be grateful if we could have that

hearing. The deadline we put was August 15th, it turns out that's a Sunday, so if sometime the week of the 16th is available for the Court to have a final hearing to confirm the modified plan, we'd be grateful.

Your Honor needs to -- may need to decide, or may choose to decide what objections to confirmation Your Honor will consider. As we argued in our pleadings, there's -- to the extent the modifications don't change something Your Honor has already found, Your Honor need not, and we submit should not, reconsider those findings, and that the objections at the final hearing should be limited to matters that result from the proposed modifications.

Your Honor, finally, the three objecting parties, there's clearly a lot of overlap, but there are some differences. Ambac particularly makes a very strong, passionate argument that it relied upon various things that were in the plan and disclosure statement to reach the conclusions it reached. And I think for purposes of this hearing, we would accept that at face value, that they relied.

This isn't a breach of contract action. If they relied on the plan, we similarly relied on Section 14.4 of the plan, which was a critical part of what they voted to accept, their -- the analysis of the objecting parties, the contract type of analysis about you can't change things if there's no ambiguity or almost like a parol evidence rule argument, would

effectively read 1127(a) out of the Bankruptcy Code and would certainly read Section 14.4 out of the plan. It's not a simple argument of contract interpretation. 1127 provides for something else.

Finally, the standing argument that Mr. Glosband made about First Marblehead speaks to a -- not only that issue, but more broadly, who is it that speaks for the securitization trusts? We've heard throughout this case that nobody speaks for the trusts, that the Indenture Trustee lacks authority to agree to things, and that's why we had to do a settlement, not by overt agreement but by an offer through the plan.

First Marblehead says it doesn't really speak for the trusts, it's just sort of looking out for their interests. But they certainly seem to have enough authority to say no when we seek to modify the plan. They either speak for the trusts or they don't. If they do speak for the trusts, they should say so, and they should say what their authority is to speak for the trusts. If they don't, then they don't have standing to be asserting objections that are uniquely those of the securitization trusts.

And it's put us, and I submit this whole process, in an untenable position of having to negotiate with a cipher and having to deal with a cipher. They can't commit to things except to say No when they don't like this. And I think time

has come for them to clarify their authority, if they're speaking for the trusts, or to sit down if they don't.

We'd ask you to approve the motion, Your Honor, sign the preliminary order that we submitted. Thank you.

THE COURT: Thank you.

MR. KAPP: Good afternoon, Your Honor. Jay Kapp on behalf of Ambac Insurance Corporation.

Before I begin, Your Honor, disclosure, I am the proud owner of a one-year old and a three-year old living Petri dish and they go to the park and play with other Petri dishes and bring back these wonderful germs and viruses that they're over with in about eight hours and Dad gets walloped for a couple of weeks. So I apologize in advance for my voice and for my coughing and for the fact that one ear is plugged up. And so with that blatant plea for your sympathy, I will begin. But if I talk too loud or soft, please tell me because I can't really hear what I'm saying, which sometimes, you know, you may agree that's okay.

Once again, Your Honor, Ambac Insurance Corporation. Mr. Sternklar talks about we have a cipher. Well, Ambac is not a cipher, Your Honor. Ambac is the controlling party or credit facility provider for three of the securitization trusts, the master trust, the 2007-3 trust and the 2007-4 trust. We vote essentially, Your Honor, for those trusts.

In addition, Your Honor, Ambac holds interest in ten

of the other securitization trusts, although we are not a controlling party. And we are a controlling party with one of the key corp trusts.

So with respect to the securitization trusts, Ambac has interests or is the controlling party of 13 of the 17 securitization trusts, and Ambac voted all of its interest in support of the fourth amended plan.

You know, Your Honor, candidly, part of all this spin, and we heard it here today, we're a little bit surprised to get this motion and then find out that we have been painted as the bad guy merely because we negotiated a term, believed what it said, and voted in reliance of that provision.

We heard today, and it's a concept from Mr. Sternklar, that they're not changing the plan, they're simply trying to implement it. I think we'll move along a lot faster if we could all agree that, yes, they're doing quite a major change. With respect to the master trust, it's a change of effectively reducing the face amount of defaulted loans that will be transferred to the master trust of over 25 per cent. I mean, that's a change, Your Honor.

And it's a change that seeks to modify a very simple concept that is fundamental to the securitization trust settlement that was negotiated over the last two years. And Your Honor, and that is set forth in Section 6.2(c) Romanette (vi) which says, and I'll summarize,

" -- on the effective date the debtor shall transfer to each accepting securitization trust all defaulted loans that were purchased by or on behalf of the debtor or its agent from the applicable securitization trust prior to the commencement date.

All defaulted loans, Your Honor. There's no contingency. There's no qualification. If a defaulted loan was purchased from the securitization trust by the debtor, then it was to be returned to the securitization trust. "All" means "all," Your Honor.

The simple concept that's set forth, as I said, in Section 6.2(c) of the plan. It's also set forth again in the definition of securitization trust collateral. It's also set forth in three separate places in the disclosure statement.

THE COURT: Has Ambac ever suggested that it had a security interest in those particular, in those particular loans?

MR. KAPP: No, Your Honor. But with that said, as we set forth --

THE COURT: And that was simply a resource that was going to be used to settle with.

MR. KAPP: I'm sorry?

THE COURT: So that was simply going to be a resource that the debtor was going to use to settle with Ambac.

MR. KAPP: Yes. The securitization trust settlement was, and part as it's set forth in the pleadings, a complicated negotiation about the arbitration and who gets what. And there's lot of -- for the concept, and we fully acknowledge that there are some loans that we may not have a security interest in.

However, we're also giving up a lot of things that we think we do have a securitization -- we do have a security interest in. So the mere fact that you say, "Aha! You don't have a security interest in that; you must not have thought you were entitled to," well, Your Honor, we're giving away a lot of things that we have a security interest in that we thought we're entitled to. But it's a negotiation: you take some, we take some, we all hate the deal, and we go forward.

So, yes, we acknowledge -- well, we acknowledge that they purport that some of these loans were purchased from the general account. There's no background information, by the way. There's nothing to support that, other than the comment in the motion. We would like some detail making that clear.

But, yes, Your Honor, we do acknowledge the point that they do say that some of those were purchased with their own funds. And if it was purchased with their own funds, then we do acknowledge that that may mean we don't have a security interest in them. We don't acknowledge it doesn't mean we thought we had a deal and we understood what was going where.

Does that make sense?

THE COURT: Yes, thank you.

MR. KAPP: You know, and, Your Honor, the plan proponents never argue ever that the language in the plan sections is not clear, and they also do not point to any language in the plan that in any way contradicts those two sections in the plan. And that's because the plan contains no such conflicting language. The plan is clear, the securitization trusts are to receive all the pre-petition defaulted loans.

And, Your Honor, if I can just for a minute, I would like to discuss a little bit of why -- of the negotiations, because I am going to try to -- even though you've partly rained on my parade, I am going to try to argue 1127(b). Legitimate expectations of creditors is a factor, and so if I may, I would like to discuss a little bit of the history.

But, you know, Your Honor, there's no reason why impaired creditors voting on the plan could not rely on the clear language of the plan. And indeed, there's nothing before this Court to suggest that creditors did not rely upon that, or understand such clear language, when they overwhelmingly voted in support of the plan. I mean, that's what we're missing, Your Honor. The plan is clear, and all the classes voted overwhelmingly in support of it.

Your Honor, the clarity and simplicity of this

concept was not by accident. It's a result of intensive detailed negotiations over an extended -- expanded period of time.

All this back and forth, Your Honor, of the pleadings between the plan proponents and First Marblehead about who said what, and this "he said/she said," if you will, Your Honor, to Ambac, none of that is relevant. Because Ambac negotiated directly and only with the plan proponents.

And as we set forth in our objection, Your Honor, we've tried to -- we've been trying to get out of this case, Your Honor, for over a year. We've negotiated two settlements, one with TERI and then one with both plan proponents. One was filed August 13th, the other one was filed December 1st of last year.

The concept that all defaulted loans purchased pre-petition, that was in both of those settlements. As they acknowledge, and we point out in our objection, that concept was then rolled over into the first amended plan filed October 22nd, and it's been in every plan to date. It's been there. Same language.

And indeed, when it wasn't, Your Honor, Ambac objected.

And I would point, Your Honor, we filed an objection to the third amended disclosure statement on February 12. And in particular, Your Honor, when -- we said the following.

"The disclosure statement does not expressly identify the entity that will receive defaulted loans purchased by the debtor prior to the petition date. Although it is Ambac's understanding based upon conversations with counsel of the plan proponents, that the securitization trusts will receive such defaulted loans purchased by the debtors prior to the petition date, the disclosure statement currently does not expressly provide for such treatment or for any other treatment. As a result, such ambiguity should be addressed by the securitization trusts, including the Ambac trust, to be able to adequately assess the securitization trust settlement."

Your Honor, in resolution of such objection, and this is exactly the issue we're talking about now, the plan proponents amended the Section 6.2(c) Romanette (vi), to read exactly as it reads now, to provide for the clear language it contains today, that all pre-petition defaulted loans will be transferred to the securitization trusts.

This is a perfect time, Your Honor, if there was going to be any other interpretation -- I mean, this was basically our trying to get on the same page, have apples be apples, and say what are we talking about. And instead of hearing different interpretation, we got -- the plan

proponents revised the section to read as it currently reads today, "all loans."

And, Your Honor, it goes deeper than that as well. Ambac also objected on February 12th to the chart set forth in the disclosure statement on Section 183(d)(6). And that chart purports to set forth all the defaulted loans purchased by the debtor from every single securitization trust, both pre-petition and post-petition defaulted loans.

And at that time, Your Honor, the chart didn't provide that information for the Ambac trust. It contained the information for all the other securitization trusts, but not for Ambac. And so Ambac objected again, Your Honor, and I read this, because once again it's exactly on the issue we're talking about now.

> "In order for Ambac to make an informed judgment as to whether to accept the securitization trust settlement, the debtor should be required to disclose the face amount of defaulted loans pertaining to the Ambac trust purchased by the debtors both prior to and after the petition date. Without such information it is difficult, if not impossible, for Ambac to make an informed decision as to whether to accept the proposed settlement."

And I quote, Your Honor,

"As it has no assurance that Ambac and the plan proponents are contemplating the same or similar amounts with respect to such defaulted loans."

So there we are, Your Honor, we're asking what are we doing?

And I would note, Your Honor, from their response on page 7, we've now learned that prior to February 6, that TERI was aware that some of the defaulted loans purchased by the debtor from the securitization trusts were purchased with funds not from the securitization trusts. They say that on page 7, they're aware of it. That was prior to February 6, but there they are on February 25th negotiating to resolve the Ambac objection.

And what did they do, Your Honor? They updated the defaulted loan chart to set forth the pre-petition defaulted loans purchased from the debtor, by the debtor, from the securitization trusts, and the Ambac trust, and such numbers included all the defaulted loans purchased from the securitization trusts by the debtor pre-petition. All of them. All of them. There wasn't any break-out, there wasn't any contingency. And they don't dispute that fact, Your Honor, that the chart sets forth all the pre-petition defaulted loans.

So, Your Honor, not only did Ambac rely on the clear language of Section 6.2(c)(vi) that "all" means "all." They

also relied upon their negotiations and the chart that sets forth the exact dollar amount of the pre-petition defaulted loans that were purchased from the master trust and the Ambac trust, pre-petition.

And Your Honor, this is the only place in the disclosure statement that breaks down individually how much was purchased from each individual securitization trust. So of course they relied on it.

THE COURT: So let's assume that everyone was absolutely clear and that the plan proponents came back and said, "All right, we'd like to clear this up because we certainly don't want you to be confused in any way; we are talking only about the loans that were purchased from the pledged accounts."

So what is your -- what is Ambac's next move?

MR. KAPP: As of today?

THE COURT: As of then.

MR. KAPP: Well, Your Honor, at that point presumably we were still negotiating the plan. I --

THE COURT: So Ambac would have said, "We're not gonna go along with that"?

MR. KAPP: Those -- Your Honor, there's a lot to be made that we're a financial institution and therefore sophisticated. But we believed what we thought we believed. And that -- this interpretation --

THE COURT: Well, I'm not suggesting bad faith on anybody's part, nor am I suggesting that this is a problem other than a failure to -- of minds to meet.

All I'm saying is, let's assume that this problem had been completely identified with the same clarity which is being sought today, and they said to Ambac, "Oh, no, no, you thought we were talking about the loans that were purchased out of the operating account? No, no, no. Just the ones out of the pledged accounts." So Ambac would have done what?

MR. KAPP: I think Ambac would have done what Ambac had done previously, which was negotiate with the plan proponents, as that understanding was different than ours, would change our valuation of the entire negotiated settlement, which it does, and therefore we would have gone back and readdressed the entire settlement.

THE COURT: And if they had said to you, "You know, we're going to stay with what we've got," and they had filed a plan in the fashion and with the clarity that they've done it now, does -- did Ambac have any leverage other than to refuse to accept the plan?

MR. KAPP: Your Honor, my answer probably is going to be inadequate because I haven't completely thought through it. I would say that, and we set forth in our objection, that they put forth in their pleadings a lot of different places where there was value to having Ambac go along with them. And

if Ambac did not go along, as I stated, Ambac has interests in 13 of the securitization trusts.

If 13 securitization trusts -- and I'm no way suggesting that that would have happened, we never had to vote on it because we thought we had a deal. If 13 securitization trusts opt out of this plan, I don't know how this plan is workable. I don't know how it's workable. I don't believe that there's enough money to sustain this, and I don't -- to fight the fight that needs to be fought for as long as it will take. I'm not sure, I don't believe their statements that that's no big deal.

Maybe one, but Your Honor, a couple? Particularly when they're all on board now; I don't know. I think they have shown they negotiated for a long period of time with Ambac to get Ambac back on board and they were. I don't believe that they would have just willy-nilly flushed Ambac down the toilet.

THE COURT: So, so you say that it would have been--

MR. KAPP: Well, maybe they would, I don't know.

THE COURT: All right.

MR. KAPP: And then we'd be where we are. But I think what would have happened is we would have continued as we had done, and I thought we actually had a pretty good line of communication up until we didn't, but I think we would have gone back and readdressed that. And I don't know where it

would have gone, but I'm pretty sure that's what would have happened.

But instead, Your Honor, we thought we had a deal, and we moved forward.

Your Honor, as I said, I bring that up because I think that background's helpful when discussing the actual legal arguments. And if I can, I'd like to briefly run through them and try my best, in my weakened condition, Your Honor, to convince you about 1127(b), another shameful plug, but here I go.

The standards of 1120(c) of the Bankruptcy Code we believe should be applied to the motion. Although 1127(b) doesn't define when confirmation occurs, it doesn't have to, Your Honor, because that's taken care of by 1129.

And Ambac in its objection cites a litany of cases, Your Honor, for the proposition that the requirements of 11 -- if the Court finds that the requirements of 1129 have been met, it must confirm.

The plan proponents don't dispute any of these cases. They don't bring it up in their response. And it is also undisputed, Your Honor, by all the parties, that this Court at the confirmation hearing on April 28th, 2010, found that the requirements of 1129 had been satisfied.

Now, Your Honor, therefore Ambac believes, after the Court made this finding, the plan either confirmed, which we

actually don't think happened, but what we do think happened is the Court is required to confirm that plan.

The procedural -- we understand that an order is needed, but, Your Honor, that could be a one-word page that says "confirmed," and it's done. And the concept that that is what is holding up confirmation, when all the requirements have been found under 1129, we could find no case law for it, neither could they.

And, Your Honor, that just doesn't jive with the case law that interprets Congress's intent behind 1127(b). And we cite a fair amount of cases with respect to that, Your Honor, including ***Antiquities*** which says, and I quote,

> "Congress drafted Section 1127(b) to safeguard the finality of plan confirmation. If Congress had not so drafted Section 1127(b), a proponent of a plan could file an endless series of motions to modify the plan, seriously jeopardizing the incentive for creditors to vote in favor of the plan."

We also, another case we cite, Your Honor, is ***Rickel Association*** which quote,

> "Section 1127(b) reinforces the principle of finality by preserving the rights bought and paid for under a plan of reorganization."

And as previously described, Your Honor, this has been negotiated and negotiated. We thought we had a deal. We

do think that's relevant, despite Mr. Sternklar's comments, precisely for 1127(b) and what I read here. And we have voted on the basis of such negotiations.

And, Your Honor, we also note at some point it has to stop. They filed a plan, they amended the plan four times. That plan had a confirmation hearing. We found all the requirements of 1129 were met. They then modified the plan on June 9th. They modified the plan again on July 9th to undo some of the changes they made on June 9th. I mean, enough, Your Honor. It's time -- it's time to go forward. And at least if they're going to change the plan, they need to do it by conforming with the heightened standards of 1127(b), to protect the rights that were bought and paid for pursuant to negotiations.

No one's disputing that occurred, Your Honor, and the case law speaks directly to it, and to protect those rights. And they don't dispute in any way those cases. And there's no case laws that they cite that somehow throws the cases I just read to you -- tries to distinguish that or is contradictory to those cases.

And, Your Honor, if that's the case, if 1127(b) applies, then we argue that they don't satisfy the standards of 1127(b). Under 1127(b), it is the plan proponents' burden to demonstrate that circumstances warrant a modification to the plan.

The cases are very clear, Your Honor, this is a very hard standard to meet. Indeed, as we cite the ***Modern Steel*** case, that case held that an inability to fund the plan does not justify modifications.

And even where the Court did find that in a workable plan constituted a circumstance warranting modification, such Courts first determine that the plan was unworkable through no fault of the plan proponents.

And Your Honor, that touches the ***Dunalot Dairy*** (phonetic -- Dunavant & Son Dairy?) case which both us and the plan proponents cite.

Also Courts have refused to modify the plan where it would impact the legitimate expectations of creditors. The plan proponents acknowledge this point in their response. They also cite to ***Envirodyne*** as we do. We also cite to ***Best Products*** for that proposition.

Your Honor, the plan is workable here. As the plan proponents' counsel and advisors advised this Court on April 28th, the plan is essentially a pot plan. Whatever's left goes to unsecureds. If the plan proponents are seriously going to contest the plan isn't feasible, we think there should be an evidentiary hearing to somehow demonstrate how the plan is not a pot plan and how their comments made on April 28th are somehow different. They'd have to explain this because it's directly contrary to the comments they made on

the 28th.

The plan proponents' response -- excuse me, Your Honor.

Moreover, if the plan is currently unworkable, it certainly hasn't been demonstrated that it is unworkable through no fault of the plan proponents. Indeed, Your Honor, as they self acknowledge, they knew of this issue prior to February 6th. They negotiated clear language that runs contrary to that understanding. And it's quite clear that all defaulted loans go to the securitization trusts.

So, Your Honor, that would have to be demonstrated as well.

For their part, Your Honor, the plan proponents try to suggest that 1127(b) is an easier standard, and that modification is allowed in a multitude of contexts. They say that in paragraph 47 of their motion.

As we set forth in our objection however, Your Honor, most of their cases deal with 1127(a), not 1127(b), and so are not applicable. They do cite to a ***Beal Bank*** case which does refer to 1127, but it's not a 1127 case, Your Honor. There the Court modified the plan itself, not pursuant to 1127, but through its own inherent powers. And all they did was not change treatment, they just extended a payment deadline.

Now you've heard today, Your Honor, and they argue

in their response, the plan proponents now try to lessen the standards of 1127(b) by merging the two standards in 1127(b), substantial consummation, and the plan -- circumstances must warrant. They basically argue that if a plan hasn't substantially consummated, then circumstances warrant a change in the plan.

They also argue in their response, Your Honor, that the creditors' expectations can't be upset if the plan hasn't substantially consummated. They cite to no case law for that proposition, Your Honor.

And, Your Honor, if I just may, there's no case law to support this. There's two separate requirements under 1127(b). A plan may be only modified only if circumstances warrant modification, but before substantial consummation. As *Collier's* says, and they quote *Collier's*,

> "Substantial confirmation refers to whether a plan is modifiable at all, while circumstances warrant relates to whether a modifiable plan can be modified under the facts."

Your Honor, we cite to four -- many cases, but four in particular: ***Price***, ***Modern Steel***, ***Mini Storage***, and ***Dunavant***. All evaluated whether the circumstances warrant modification separate and apart from the question of substantial consummation. It's separate, Your Honor. And they just don't meet the standard.

And finally, with respect to 1127(d), Your Honor, all they argue is that circumstances warrant so that they can -- they can clean up ambiguity in the plan. They cite to no case law where this was sufficient. We were unable to find any case law where a Court, just to clarify the clear language of a plan, allowed an 1127(b) modification.

And indeed, Your Honor, the result flies in the face of two well-established strings of case law. One, the concept that ambiguous terms are construed against the drafting party. We don't think there are any ambiguous terms in the plan, Your Honor, but if they are, they need to be construed against the plan -- against the plan proponents.

Particularly, Your Honor, when the plan, as Section 1416, which says if there's any ambiguity between the plan and the disclosure statement, the plan governs. They cited to no conflicting language in the plan. They mere -- they cite to no actual language in the disclosure statement. But they say, "Well, if you look at chart on this page, one number, and compare it to the chart on that page on another number, then you should realize they're inconsistent, and therefore what it says on this chart on the third page shouldn't apply." That's basically what they argue, Your Honor.

But even if it is ambiguous, the plan Section 1416 says you don't pay attention to it if the languages in the plan are clear. They are clear, Your Honor.

And second, once again, Your Honor, 1127(b) is clearly designed to protect the terms of the negotiated plan once it is confirmed. Congress understood, Your Honor, that a plan can always be revised, a deal can always be re-cut, but for 1127(b) Congress provided that once a deal was confirmed, it can't be modified unless there is a distinct change in circumstances.

There's no such change in circumstances here, Your Honor. They've never even tried to demonstrate it. And therefore, we would argue circumstances do not warrant modification under 1127(b), and the motion should be denied.

Now in the alternative, Your Honor, deep breath, if the Court determines that it is appropriate to modify the plan, then unfortunately we believe the entire process must be restarted. Indeed, Your Honor, the case law is very clear here. That where a creditor class is adversely harmed, a new disclosure is required, new solicitation is required, and impaired classes should vote, and the new plan itself must satisfy all the conditions of 1129.

The plan proponents acknowledge that three of the securitization trusts are adversely impacted here, including the master trust.

Your Honor, as I said, the modified plan would decrease what the master trust receives face value of defaulted loans by over 25 per cent. We say "Ouch, Your

Honor, that's an adverse change."

And Ambac would argue also, Your Honor, that all the securitization trusts are adversely harmed with respect to the recoveries, Your Honor, the 6.2 million dollar issue. The securitization trusts are, under this modified plan, are giving up the right to a hundred per cent of cash in exchange for an unsecured claim of a mystery distribution, and we would argue, Your Honor, that that is an adverse impact as well.

But the point, Your Honor, is, as long as there is one class that is materially adversely harmed -- and here they acknowledge there are three -- then you have to start over. In particular, Your Honor, you must provide new disclosure. Ambac in part cites to ***Concrete Designers*** and ***Downtown Investment Club***. And in fact, Your Honor, ***Downtown Investment Club*** specifically rejected what the plan proponents are requesting here, is that their 1127 motion to modify the plan suffice as a disclosure. That was denied.

The plan proponents do not cite to any case whatsoever, Your Honor, where an adverse change occurred and new disclosure was not required. You'll be the first if you grant that motion. In all their cases, there was no adverse change. The change was insignificant. ***Solar King***, insignificant. ***Temple Zion***, in fact the creditor impacted there was being paid in full. You'll be the first, Your Honor.

Indeed --

THE COURT: And that won't be the first time.

MR. KAPP: That won't be the first time?

THE COURT: That I was the first.

MR. KAPP: Well, you know, someone's got to go first, Your Honor.

And, Your Honor, the plan proponents now argue, they don't dispute those cases, they now argue that additional disclosure is not necessary where the affected creditors have been active in the case and are aware of the changes. Both Mr. Glosband and Mr. Sternklar made that point.

They cite to two cases for that proposition, ***Sherwood*** and ***Temple Zion***. But again, Your Honor, both of those cases deal with an insignificant, immaterial change. They cite as much with respect to ***Sherwood***, and ***Temple Zion*** as I stated, Your Honor, the impacted party was being paid a hundred per cent in full.

Once again, there are no cases where additional disclosure was not required where a creditor was adversely impacted.

And, Your Honor, disclosure is necessary. The disclosure statement was primarily prepared last winter and January of this year. It contemplated that the plan would be confirmed by June 30. Well, here we sit, Your Honor, in the middle of July, and we're not confirmed. Facts have changed

and need to be updated. Particularly, Your Honor, what about the cash? You know, I wanted my cute little quote. I'm basically, from Jerry McGuire, you know, "show me the money," Your Honor. But we need to know what's going on with the cash.

The disclosure statement contemplated that a recovery of unsecureds between 40 and 60 per cent, and that at least 36 million would be on hand at the effective date. We're six to seven months later, Your Honor. How is that projection looking? How much cash is still on hand? How much does the company have? We need information, Your Honor.

The plan proponents' professionals have not filed any fee applications in this case since last year. Monthly operating reports are not publicly available on the docket. All creditors, Your Honor, are entitled to know how much has been spent to date so they can reasonably assess whether to believe the plan proponents' projections now, today, as we sit in July, as to what recovery they will receive, Your Honor. We're no longer in -- there won't be a plan effected by June. We're not in last winter. It's a new -- we've moved on, we need to update the disclosure.

And, Your Honor, that is relevant. We do want to know what the recovery is. We have no idea how much cash is still on hand. And as it is a pot plan, we realize that, all right, it may be less than 40 per cent, but we should know.

We should reset it. The information is stale and it's old. And they don't dispute that. They just don't want to tell you. But we want to know. And we believe we're entitled to know, Your Honor. And we believe we're entitled to know under 1125.

Likewise, Your Honor, the ***Proveaux*** case makes clear that if a material adverse change occurs, all impaired classes should be re-solicited and have an opportunity to re-vote. The only cases the plan proponents cite to, once again, Your Honor, they only concern whether the proposed change is immaterial.

So after a new disclosure statement and a hearing, the plan must be solicited, and the impaired classes must have a right to vote.

And, Your Honor, just with respect to that, as I stated, Ambac has been trying to get out of this case for over a year. It really doesn't want to delay confirmation any more than we have to. We would love to get our hands on the pledged accounts that the securitization trust settlement provides. However, Your Honor, and we would love not to have to go through the cost of going through this again. But there are consequences to the actions. And if the plan proponents seek to modify, then they have to restart the disclosure solicitation and confirmation process because here, classes are adversely harmed. And they cite to no case law to the

contrary.

Finally, Your Honor, objections to the confirmation of the modified plan can't be limited in scope as the plan proponents suggest. We cite ***Temple Zion*** and ***Dean Hardwoods*** for that proposition. The modified plan must satisfy 1129 on its own merits, Your Honor. The Court is of course free to do what it wants to with those objections, but objections can't be based on an old finding with respect to an old plan. The new plan must be held to the standards of 1129. They cite to no relevant cases in support of that contention, Your Honor. They cite to three cases. Two of them aren't even 1127 cases, Your Honor.

The third case is ***Attila Golf*** (phonetic) which one again, although it mentions 1127, it certainly doesn't stand for the proposition that you can hold an impaired creditor to old findings with respect to confirmation of a new plan. All it did, Your Honor, was in ***Attila Golf***, the debtors' plan wasn't confirmed. A competing plan was confirmed. The debtor refused to comply and do actions under that plan, and instead it filed an 1127 motion to amend the plan.]

The Court said, "Well, wait a minute, we're in a gray area, 1127 was never meant to be a legislative tool," and therefore they didn't quite know what to do. They did allow the 1127 motion to go forward, and at the same time they compelled the debtor to act, and they noted that because they

compelled the debtor to perform under the plan, their 1127(b) motion would be substantially mooted.

But none of that stands for the proposition that the plan proponents cite for in their brief, that somehow we should be bound to prior findings, Your Honor. And there is no case law that says that.

So finally, Your Honor, in addition, we do believe additional disclosure is needed. Such info is set forth in detail in our objection. And we would ask, Your Honor, that such disclosure be required, and that if it's not addressed, that Ambac have a right to object in an 1125 hearing to such disclosures.

The information set forth in four general categories, Your Honor: One is cash. Two is maintenance of the pre-petition defaulted loans if the securitization trusts opt out. Your Honor provides -- we argue that we have a security interest. They have obligations to assure and to protect that security until we figure it out. The plan currently provides that the defaulted loans will perhaps be maintained for 90 days, but nothing after that point.

We would like some disclosure to be assured that our pre-petition defaulted loans are protected if a securitization trust does opt out. We think that's only reasonable.

And, Your Honor, given another category, given all of the hoopla over who's getting what on the pre-petition

defaulted loans, we do think that chart in the disclosure statement to avoid all doubt should be updated to set forth and separate for every single securitization trust who's getting what. It's in bits and pieces in the motion. It's not set forth in one place. Given all the confusion that we've had in the last year and a half, we don't think it's unreasonable or a waste of time to put it in one place so everyone's on the same page.

And finally, Your Honor, there are several unsupported contentions in their motion. They state just off the hand with no back-up that the unsecured claims aren't impacted, maybe they're diluted by 1.1 per cent. There's no affidavit from their financial advisor, there's no underlying support. We don't think that's unreasonable. We think it should be required.

Similar, they talk about the pre-petition defaulted loans that were purchased using another source other than securitization funds. It's very general, Your Honor. We do believe more detail to the extent that some can be provided, we're happy to work with the plan proponents but we do believe that some disclosure is needed for those areas. And we don't believe as Mr. Sternklar said that it's unduly burdensome.

And then finally, Your Honor, although ignored by the plan proponents, we do have three problems with the proposed order, and I do want to set them forth and I don't

want them to be ignored.

One, Your Honor, we believe that the requirement that in order to change your vote, you have to have a copy of your previous ballot is unduly burdensome. That wasn't required in the original procedures. It shouldn't be required now. Moreover we note there's been lots -- there has been trading on these bonds. If you bought after the first go-around, you wouldn't even have access to that ballot, the original ballot. So we believe that requirement should be deleted.

We also note, Your Honor, that the proposed order in paragraph 90 sets forth what, in order to change your vote, the steps you have to meet. If you meet those steps, Your Honor, that should be enough. The plan proponents contain the right in their sole discretion to determine, in paragraph 6(c) that even if you meet all those requirements in 9(d) somehow your ballot can be ambiguous. We think, Your Honor, at most, at least that's duplicate and at most once again it's unduly burdensome. If you meet all the requirements of 9(d), there shouldn't be any doubt as to whether you want to change your vote or not.

And finally, Your Honor, paragraph 10 of the order. We're not even sure what it means, but it seems to change the contractual relationship between the Indenture Trustee and Ambac under its indentures. And we would seek that that is

inappropriate and we would ask that that provision be deleted too, Your Honor.

So thank you for your indulgence, Your Honor. Just to recap, we would request that the motion be denied, as it does not -- circumstances do not warrant it under 1127(b). If this Court determines that the motion should go forward, we would argue because there has been an adverse change, we have to restart the process, new disclosure, a disclosure statement hearing, solicitation with the right for all impaired creditors to re-vote, and you can't be bound, Your Honor, by prior -- by prior findings. Objections against the new plan should be able to be heard and shouldn't be limited in scope.

We also ask for a finding that the securitization trusts are adversely harmed. At least, Your Honor, the Ambac trusts, and we would ask that the confirmation order be -- I'm sorry, that the proposed order be revised as we request, and we'd ask for the disclosure as we set forth. Thank you, Your Honor.

THE COURT: I'm trying to figure out whether to take a break now or a little bit later. How many other counsel expect to make remarks?

Okay. So we'll take a five-minute break.

[Off the record at 2:39:29 p.m.]

* * * * * * * *

[On the record at 2:47:34 p.m.]

MR. REYNOLDS: All rise.

THE COURT: Please be seated. Go ahead.

MR. PEDONE: Good afternoon, Your Honor. Richard Pedone on behalf of U.S. Bank as Indenture Trustee. U. S. Bank is the Indenture Trustee for the series of securitization trusts identified in our objection.

The Indenture Trustee's position that the order -- that en order confirming the plan that this Court conducted a trial on should enter and bring the case to a resolution. That plan as a pot plan is, in fact, confirmable. You've heard evidence concerning its feasibility, and that is --

THE COURT: Your -- your brother says that if I confirm the plan, then it must fail because he says that 1129(a)(11) can't be met because they're out of cash and that -- and he bases that on what Mr. Glosband said.

MR. PEDONE: Well, Your Honor, if we go back to the testimony at that trial there were several pots of cash for TERI to continue going forward as an operating concern. There's a big pot of millions of dollars of charitable money that would allow TERI to continue forward with it's charitable mission. Maybe it can't continue to pay the same salaries to executives and do everything they would like in support of their charitable mission, but there's testimony that --

THE COURT: Then on the date of -- well, but I

took -- I, I, I apologize for interrupting you.

MR. PEDONE: That's okay.

THE COURT: I, I took testimony --

MR. PEDONE: Yes.

THE COURT: -- and the testimony was based on both the charitable admission and the fact that, if I'm remembering this correctly, that before TERI ended up in a situation in which it was going to be very, very badly hard pressed for cash, it was going to advertise itself as a superior student loan collection group.

So are you -- are you saying that -- that I've got enough testimony to lead me to believe that TERI can function as a -- as a charitable -- charitable organization only?

MR. PEDONE: I believe you can, Your Honor, and we're in the realm, if you look at that transcript, we're in the realm of a charity, and -- and what makes a charity feasible, when we're talking about a few million dollars, whether it's three or six or whatever our number is, it will be left behind for the charity versus distributing millions and millions, tens of millions, perhaps even over hundreds of millions, if you consider the pledge accounts, to the secured creditors.

The entire combination is what this plan is about. It's distributing the assets and what makes it feasible. Achieving a particular level of dream that the Board may have

for the level of charitable function for this charity in -- in good deeds, the Court can't look at their view of what they want as what makes the charity going forward feasible. If you look at what I believe you said you should look at, which is, will the debtor at the hearing, will the debtor return to the Court, and -- and I submit that there's evidence in the record that, with its charitable funds to perform a mission, TERI would not need to return to this Court, and --

THE COURT: But haven't I, if -- if you're going to take the position that the words that I used are themselves somehow deemed to be confirmation, and didn't those words also include my reliance on other functions that TERI was going to be able to perform in order to assure the fact that 1129(a)(11) was going to be met? So how do I -- how do I now cut that one out?

MR. PEDONE: Yeah. I guess, Your Honor, where I would start is, I would take the black and white language of the plan that you had before you, and if you read it where things were going, it was crystal clear. And I would say you could even take the chart and the disclosure statement that makes it clear where the defaulted loans go to my client, a chart I -- not my clients, but go to the trust of which my client is the Indenture Trustee that they issued.

If you look at that chart, it's clear where the

money goes. If you look at the -- this -- the plan, which is really a contract that the creditors voted on and it's a settlement the creditors voted on, it's clear what happens here, and that's what you confirmed, was that plan, and they're back here now trying to change that. And on the continuum of steps towards entry of the confirmation order, which is a ministerial act, I would submit that all that remains here is that ministerial act.

THE COURT: Yeah, I wish it was a ministerial act, but what's usually given to me is a, in cases of this size, is a 40 to 50-page document that I then have to ask you send to me in Word form so that I can take out those provisions that I don't like, and -- and sometimes I've had to have hearings with respect to particular provisions. It doesn't feel ministerial to me.

MR. PEDONE: I -- I appreciate that and I'll concede that it was dozens of pages that were circulated and, or more than a dozen pages where the form of order circulated among the parties; but I think you have a black and white plan before you that if you entered confirmed could be enforced to achieve what was at least the intention on this side of the room, what their intentions were, they -- they've stated them, and I'll accept that that's what their intentions were for this hearing.

So that's our position with the Indenture Trustee

request. I realize that's not the direction the Court may be leaning at the moment, but we do believe it could occur and it is, in fact, a ministerial act because you've held the confirmation hearing, you made the finding, and had you written "confirmed" on the docket, we would have everything we need for the case to be truly complete. Perhaps not. I believe it would actually end up consummated, as that term would be used, because it is primarily a pot plan with distribution.

What I want to emphasize, Your Honor, after having made that point is that this plan was settlement. This plan had provisions in it to settle a very, very -- a pair of very complex disputes. When you read the plan memorandum the debtor's discussed submitted for the plan, the debtor's discussed that the settlements form the foundation of the plan.

Ms. Bizar's affidavit stated the same thing. Mr. Peko's affidavit goes on for pages about the settlement. Mr. Renzi's affidavit goes on for pages about the settlement. You heard today that the debtor and the Committee described the settlement. You also heard from the debtor and the Committee that the plan was an offer put out to the creditors for acceptance.

And then what you've heard and what you've seen is that a new settlement is being put out with no provision for

acceptance of that new settlement by the parties. What they say is certain people can change their vote, but that isn't actually going to result in an acceptance of the settlement. It will end the litigation in this case. So that we need to step back and remind ourselves that the two important pieces that we're actually settling.

First, there's the decoder in this case. If you recall the securitization trust and a lot of other creditors had guarantee claims against TERI totaling billions and billions of dollars that I would submit run up in terms of complexity for calculating might compare with the most complex asbestos cases, or -- or other complex cases. Because to determine what the guarantee claim would be in virtually all parties, I think all parties filing these claims filed claims for the full amount of the outstanding loans that they might someday call upon TERI to guarantee. Well, those needed to be present valued and for the Court to decide on a trust-by-trust basis, you actually have to look at the loans and say, "Well, when were the loans made? How much is outstanding? What's the payment history? Who made those loans?" And to figure out on a deal-by-deal basis what the actual claim should be for distribution purposes. You either need to hold a trial and estimate them, or you need a compromise to settle them.

And the decoder that you've heard a lot about was

rough justice that the parties had a lot of discussions about that TERI and the Committee went back and forth on, FMDS weighed in on it, the Indenture Trustee watched the process, and out of it came a method for determining claims, and other unsecured creditors participated. Out of it came a decoder that achieved a rough justice for taking billions of dollars of claims, estimating them, arriving at claim numbers that could be used to divide up the relatively small money that TERI has -- TERI has available for distribution.

In the absence of a compromise accepted by creditors, you're left with litigation that could take days and days, if not weeks and weeks or months, and an extremely high cost to resolve.

So what I most emphatically want to emphasize is the procedure and process that comes out of this hearing has to be a method for affirmative acceptance of the settlement and the plan. Perhaps 1127 allows the -- a plan to be amended and sent back only to people the Court determines are adversely affected, but I would say if you want an settlement that would be enforceable, you actually have to go through a re-solicitation process and that TERI and the Committee should want the holders, and certainly the subsequent plan Trustee should want the holders who can then direct each trust to accept the settlement, or reject the settlement. And if you get an accepted settlement and a process that

works under each trust Indenture documents and of the governing documents, which we believe the plan procedures -- solicitation procedures did, then you can bring finality to the case.

Otherwise, if you don't have procedures for settlement that work and acceptance of the settlement that get built into this plan, we'll be left with litigation. And I think it's undisputable that if enough trusts do not accept the plan, we won't have a confirmed plan. We'll be back here with the debtors saying that they can't afford ongoing litigation, or the debtor -- Committee saying they can't afford ongoing litigation, because this -- this case and the consensual resolution and the reason that everybody voted for it was that it was a settlement in principal, a settlement that required some complex procedures to get acceptance by the trust.

But you know what? We got there. And it could happen again. In the short-cut rough justice, it's complicated, even with the concession that it go out to all trusts, it can't do it in 30 days to get them all back and have voting by August. The Indenture Trustee would like procedures substantially similar to those used for initial voting be used again.

The other piece of the settlement here is the settlement of the perfection litigation, and I believe the

pleadings that this Court has heard and the motion to dismiss on that speak clearly that that in itself is complicated and results in a complicated resolution. I'd submit it's so complicated that the plan drafters couldn't get it right the first time that they drafted the plan to reflect their intentions. And that settlement of the perfection also needs to be blessed by those who could be on the other side settling, which is each trust.

Your Honor, Mr. Kapp described for Ambac the reasons that the various pieces of the modifications are, in fact, adverse to each trust, and I would like to echo that. But what I'd like to emphasize is, they're adverse because they changed the settlement. They impact the timing of when the cash may flow out on the pledge accounts, but they also result in taking cash from each securitization trust and substituting cash paid on the effective date, according to the black letter terms of the plan, and replacing it with a payment stream from a certain amount of defaulted loans based upon an estimation that the plan proponents have come up with. Swapping cash for an uncertain payment stream is an adverse change and that alone, it dictates that this is effectively a new plan and a new settlement that needs to be voted on by each securitization trust.

Your Honor, with regard to the procedures, I'd also submit that the debtors recognize the complexity of obtaining

approval of the settlement and the plan from each securitization trust when they filed their initial plan solicitation procedures and motion for approval of the disclosure statement. They laid out in there the complexity. They articulated the complexity of the confirmation hearing. In connection with approval of the disclosure statement and the plan solicitation procedure, this Court then entered an order, an order directing that certain procedures be used.

I would argue that the debtors and the Committee should be judicially estopped from now attempting to utilize *different* procedures in connection with either this plan or any subsequent plan, and that what should happen as a practical matter if the Court is not inclined to confirm the plan is they should be directed to sit down with the parties in interest, take the old procedures, and adopt them to these circumstances to provide sufficient due process. And this is, in effect, a -- a due process issue, Your Honor, not just a judicial estoppel or practical issue.

TERI contracted with securitization trusts, and that was a -- a large part of its business. They knew when they contracted with the securitization trusts that those trusts would then go and pledge their interests and TERI's guarantee any payment stream to the Indenture Trustee on behalf of note holders. TERI, as part of its business and as part of a huge revenue stream that led to some of the money

that's to be divided up today, entered into contracts with a party that was difficult to contract with, or change the contract with at a later date, or as we are here settle with at a later date.

Mr. Sternklar said, "Who speaks for the trusts?" I hope he was being facetious because he's at -- he's had access to the trust documents and knows the complexity of the situation, and we've sat through hours of meetings where it's been explained. We have a procedure in those earlier procedures orders that will allow a settlement to become enforceable and we should stick with those procedures.

Your Honor, it -- a point in the reply that debtors made reference to, the cost of utilizing these procedures as potentially being too high in -- in resoliciting, I'd submit that the cost of not entering into a settlement and being back here litigating either perfection issues, or the other issues concerning the decoder in the fall would be far greater, and if the Court isn't inclined to compel the debtors to utilize procedures satisfactorily, or at least as good as those used before, that they offer evidence on the counter-balance and costs.

Your Honor, another point on the material -- excuse me, on the adverse impact, is the withdrawal of the exculpation with FMDS. FMDS is a contractual party with each of the securitization trusts. To the extent that finality is

not brought to the trust litigation, then the deal that the securitization trusts voted on is not what was initially offered in the plan, and so that exculpation is an important -- the removal of that is an important material change, and the Indenture Trustee's preference would be that it be put back so that any settlement either, if it's enforcing the one that has been reached, or it's in connection with a resolicitation process, bring finality.

Your Honor, another material issue is the 6.2 million dollars. In fact, there is a claim that that is collateral of the various securitization trusts, and any plan that goes out in order to meet the requirements of 1129 will actually have to provide for the segregation of that fund, those funds, until either the trust with a particular interest in it accepts the -- a settlement, or litigation with that trust has been determined.

So we may have an issue of TERI standing here today saying that they need that money in connection with any plan, or their modified plan, because those funds may, in fact, not be available. To meet 1129, that money will need to be segregated.

Finally, Your Honor, I'd like to address the disclosure issue. I don't think that any ordinary investor, or any even sophisticated investor could take the old disclosure statement, to take TERI's motion to modify, to

take the objections and take the reply and quickly cut through and understand what -- what is going on here, what is the likelihood that TERI will survive and go forward and the plan will be consummated, and exactly what they will be receiving. We need a real disclosure statement in this case that should go out.

And I would submit that, notwithstanding the discussion in some cases that you might not need a full disclosure statement, this is a statutory issue; and I'd submit that none of the cases that have ever been decided on a 1127 fit within the parameters of the facts that before that you have -- that are before you, and that 1127(c) is unequivocally clear when it says,

"The proponent of a modification shall comply with Section 1125 of this Title with respect to the plan as modified."

Any modified plan by the pure black letter language in the Code needs a complete disclosure statement that, one, explains what has gone on before touches on the issues that Mr. Kapp raised and the issues in the other parties' papers.

Finally, Your Honor, in addition to giving each securitization trust the opportunity to accept the settlement and the plan, all parties in interest, including any note holders, and they would be parties in interest in this case, need the opportunity to come in and object on any modified

plan on all grounds. And essentially what I'm saying, Your Honor, is, this case with modifications, this material, I believe, requires that essentially we start the process over and get it right to bring finality to it. Thank you.

THE COURT: Thank you.

MR. JENKINS: Thank you, Your Honor. Dennis Jenkins of Wilmer/Hale, again for the First Marblehead Corporation and First Marblehead Education Resources, Inc.

Your Honor, I'd -- I'll start first by addressing the standing issue raised by the plan proponents. The -- to be clear, First Marblehead has not filed an objection on behalf of the securitization trusts. Perhaps the plan proponents misunderstood the objection, but the whole point of the objection is that First Marblehead believes that this modified plan is, in fact, worse for general unsecured creditors than the existing plan.

In addition, Your Honor, with respect to the standing issue, the plan proponents have made a number of disclosures that are either false or inaccurate or misleading that involve First Marble head. So with respect to disclosure issues, they actually invited us to comment on -- on those aspects of the disclosure.

But before I get precisely to how the economics of this modified plan adversely affect the creditors, let me address first a couple of other reasons why First Marblehead

as an unsecured creditor remains interested in this case.

First -- as -- as -- as counsel suggested, First Marblehead is an unsecured creditor in this case. It had a large unpaid balance due of roughly eleven million at the commencement of this case and has rejection damages and other damages that's asserted in excess of 80 million, making it one of the largest, if not the largest general unsecured trade creditor in this proceeding.

But First Marblehead has also remained involved in this proceeding in part because TERI made a decision at the beginning of this case to bring in-house many of the services that it previously out-sourced, and at that time it -- in June 2008, First Marblehead rejected its agreements with -- or TERI rejected its agreements with First Marblehead.

And as -- as -- in connection with that rejection, First Marblehead entered into a transition services agreement, and pursuant to the order that approved that as well as related transactions, First Marblehead has remained as a manager of collections for approximately half a billion dollars of defaulted student loans in which the securitization trusts claim a security interest and which remains subject to the trust adversary proceeding.

So First Marblehead's involvement in this has been somewhat unique because it is one of the largest creditors, and also because it has remained to maintain the -- and

maximize the value of those assets as a manager of the collections on those loans.

First Marblehead is -- is not on the Committee. It's not a plan proponent. It didn't draft the plan, it didn't draft the disclosure statement, and none of its claims are settled in the plan, but it does have specialized expertise and knowledge regarding the student loan industry that it has -- that it has attempted to lend to this proceeding from time to time to help expedite proceeding and bring it to closure through a plan of reorganization.

Again, as I mentioned at the beginning of this case, First Marblehead had agreed to a transaction services agreement for 60 to 90 days as recent as the confirmation hearing. The debtor reminded the Court that that saved this estate tens of millions of dollars. It eliminated costs that were running approximately eight to 16 million per month. The debtor has continued to manage the collections of the loans subject to the trust adversary proceeding.

In addition, there is a section of the plan, Section 6.3®), pursuant to which First Marblehead has agreed to continue managing those collections for 90 days after the effective date of the plan. When asked by the Committee to sit on the trust, the Plan Trustee Advisory Committee, First Marblehead agreed. Now it seems they don't want First Marblehead to sit on that Committee, which is fine, First

Marblehead does not object. It does note that it is peculiar that the conflict -- the conflicts that they mentioned are conflicts with the trust, that that Committee should be representing the securitization trusts. In fact, to remind Your Honor, the securitization trusts represent more than 60 per cent of the general unsecured claims in this proceeding.

First Marblehead had not objection to confirmation, and as recent as last night again filed a limited reply in an attempt to help this proceeding along, Your Honor. And I think it makes sense to stop here again and -- and review what data First Marblehead agreed to provide in the past what it agreed in this reply to provide again.

When the -- when First Marblehead agreed to the trust -- to the transaction services agreement, that -- at that time all the contracts with First Marblehead were rejected. First Marblehead agreed to provide data regarding the recoveries, regarding the -- the defaulted loans to TERI. In a letter from Amy Bizar, the Senior Vice President, and she's General Counsel to TERI, they confirmed that they received that data regarding those recoveries and the defaulted loans. Again, here today, Mr. Glosband confirm they have that information.

First Marblehead also provides ongoing monthly reporting details regarding the recoveries collected by the various collection agencies during the prior month. An

important point here is, Your Honor, First Marblehead does not collect cash and move it. All of the cash is sent directly from the various collection agencies directly to First Marblehead who then tracks that money through its accounts, but each month it -- First Marblehead provides updated reports.

In addition, as a part of the transaction services agreement. First Marblehead provides to TERI access to its recovery management system, which provides loan-level information regarding all of these loans to TERI.

Today, it -- we heard for the first time -- Well, I should back up. When -- when we saw the reply, I spoke with First Marblehead and we had no idea what information they still needed in order to allocate the recoveries. We talked internally and said we think they have everything they need, filed a reply last night, which is really an offer to provide it yet again, and we heard today that all they lack is information regarding the allocation of costs which amount to approximately $500,000.

As recently as June 14th, Mike Meady (phonetic) of First Marblehead provided that information to Eileen Morris, of First Marblehead, and does provide it from time to time. We believe they have all that information up through June 14th. We're not sure if they just haven't asked internally the people who received it, but First Marblehead is -- is

willing to provide what it has. Again, we were surprised to hear that they believe they don't have something. Again, we believe it's been provide -- provided.

So First Marblehead is here with a fairly unique perspective because it is a creditor and has been watching this case rather closely as continuing claims manager of all the various defaulted loans subject to the trust litigation, Your Honor. But all that -- all that said and putting aside what everyone thought the plan said, based on the information provided by plan proponents regarding this modified plan, after considering all the increased costs and the risks, the modi -- First Marblehead believes the modified plan adversely affects unsecured creditors. If -- if this Court is going to allow the modification to move forward, it believes that there is much more disclosure that needs to be provided, and that all parties should have the opportunity to object.

First, Your Honor, with respect to the economics, the -- there's two pieces of this here, and the entire modified plan is premised upon taking these disputed recoveries and the disputed loans, putting them back into a pot which the plan proponents then say will be returned as a -- as part of *pro rata* distributions to creditors. They include, to be clear, the -- with respect to the 6.2 million in cash, this 6.2 million in cash that they were talking about represents recoveries on pre-petition defaulted loans.

As counsel has already explained today what the plan provided was, there would be a split of these pre-petition and post-petition defaulted loans. The pre-petition defaulted loans and the recoveries on them would go to -- to the securitization trusts.

As Mr. Pedone just pointed out, the trusts do claim a security interest in that 6.2 million in cash. So if the trusts are to opt out of this new settlement, presumably that cash will need to be segregated, pending a resolution of the litigation of their claims.

So the -- the plan proponents actually provide a new disclosure that -- that we had not heard before, the reply, and was a bit surprising that -- that the 6.2 million dollars in cash is necessary to provide cash with the debtor under its plan so it can perform it's non-college access business.

What does this mean really? The plan has condition to its effective date that there be 36 million dollars of available cash coming back to the plan trust. What I think we just heard is that they will not meet that 30 -- 36 million dollar threshold under the plan. The way the plan works is, if they don't meet that 36 million dollar threshold, the Committee can nevertheless go forward and dip in and take the 3.4 million of cash from the debtor under the plan.

What I -- what it appear -- what they appear to be saying is, they do not have enough cash now to hit that 36 million dollar threshold, and that this cash that they need -- they are requiring now actually will go to TERI. So up -- what -- up to 3.4 million dollars of the 6.2 that is not coming back to creditors is, in fact, going to TERI to fund this aspect of its business, not the college access non-profit fees, but this new business that has been building over the last two years.

This -- this was precisely the issue that concerned counsel just before the petition date -- before the confirmation hearing, Your Honor. As we lay out in our pleadings, in early April when we were reading the plan, we could not tell from the disclosure statement how the accounting for cash was being done, and we did not know how the 6.2 million fit in. Mr. Pedone, and I called Mr. Glosband and said, "We read the plan to say that this 6.2 million comes back for the securitization trusts; we want to make sure that you reserved that cash." We wanted to avoid precisely this issue where they came back and claimed that they did not have all the cash that they thought they had.

In addition, Your Honor, it appears that almost 6.2 million of this additional benefit that they're seeking will not go to creditors; it will, in part, go back to TERI, and it looks like the -- the rest of any portion of the 6.2

million benefit to creditors they claim available will actually be eaten up in the costs of going through this process.

Why do I say that? In part because it affects the trusts, Your Honor, and I don't raise this to argue for the trusts. I raise it because I think this increases the likelihood that trusts opt out of the settlement in the modified plan and decide to litigate. So if you go to their Exhibit F, Your Honor, that they've included with their plan, what this says, let's take the trust 2005-1, for example. They say here that that trust will lose 812, roughly, thousand of these recoveries. In return, it will get $812,000, plus an additional $100,000 over the next ten years in back-end distributions.

On its face, what they are saying is you give up cash now to take claims at the back end. That seems pretty clear. What's not clear here though and what's not stated is, of that 900,000 to be paid over the next ten years, about 460,000 of that comes from these defaulted loans to be paid out over ten years, and a very small portion, the remaining portion is what they claim would be the cash, the proportionate share of the 6.2 million dollars coming back to that trust.

Well, we've just heard that not all that cash is coming back to the trust. It can't possibly be, if of the

3.4 million is going to TERI, that all this money is coming back to the trust. So this Exhibit F seems to be just wrong if 3.4 million is going back to TERI and certainly misleading as to what the trusts get. When the trusts realized this, will they be more inclined to opt out? We don't know. But we do know that of the 6.2 million in cash it's going to TERI and will be eaten up in costs.

In terms of costs, Your Honor, this -- this process is costing, based on the operating reports I've seen, about 1.6 million a month. We are now at a process where this will take four months and will have eaten up through the benefit of that 6.2 million dollars. So as an unsecured creditor, obviously, First Marblehead is concerned that we are following a process here that's going to eat up the benefit of that cash entirely, or the benefit of that to general unsecured creditors.

In addition, based on Exhibit F, about 2.9 million of the disputed recoveries come from just three trusts. If only those three trusts opt out of the proposed settlement and their funds are then segregated pending a resolution of litigation, where is the cash going to come that TERI needs? Certainly, if the rest of the trusts opt out, that's the real problem. But we have no idea going forward now how the trusts will vote, or whether any of that cash that they're claiming will come back will be there.

So under the circumstances, it appears very likely that the entire benefit of this additional cash will be consumed by the modified plan process itself in the delay inherent in obtaining confirmation. So from the perspective of the securitization trusts, I assume they will see this as they give up cash to pay for the cost of this modified plan, or to give it to TERI in exchange for larger unsecured claims, unsecured creditors like First Marblehead will be diluted by those increased claims and have no corresponding benefit from that 6.2 million dollars. That doesn't seem like a great deal.

In addition, Your Honor, with respect to the other piece of this on the disputed loans, this is really the second piece of the puzzle. Those disputed loans are loans that have defaulted already will be meaning that students have failed to make principal or interest payments for 180 consecutive days, that the borrower has filed bankruptcy, or the student is dead.

The plan proponents put an estimate on this at 13.6 million dollars present value. It is entirely unclear how they come up with that estimate. We believe that, based on other estimates the Committee has been looking at, it's far less than that. As a consequence, we think that that value is much less than they're saying, but for the sake of argument, assume that, in fact, the value is at the high end

at 13.5 million, that assumes none of the additional costs that could be incurred if trusts opt out of this litigate -- opt out of the settlements. It completely ignores the litigation costs of -- of the trust and the delay associated with this proceeding.

Mr. Kapp and Mr. Pedone have made compelling arguments for why all of the trusts are adversely affected. It's unclear whether they will opt out. If they do opt out, there's -- it's -- it's a very complicated piece of litigation. It's only in its initial phases before this Court, but there's a few pieces of this litigation. There's first the claim settlement portion that each trust will then litigate both the amount of its claim. There could be arguments whether the decoder that the Committee proposed is right, whether there's a base case right, whether some other valuation should be used. That only resolves the amount of the claim. Then there's the separate trust adversary proceeding that would have to be dealt with for each of these trusts to litigate its rights to collectively 500 million in loans.

So if those trusts opt out, what is the cost of that? Will creditors see any benefit? In fact, will they be worse off by going through this process and having trusts opt out to litigate each of those things? We have the proverbial bird in the hand. We have all of the trusts accepting

settlements of very complicated litigation, and we are trading that for a very small amount of cash which appears to already from a creditors' perspective to be gone, and for defaulted loans that we don't know the -- the value of those, but it could be entirely consumed by the -- the litigation and the process of settling those claims.

To give you a sense of -- of magnitude, the securitization trusts base claims, put aside the -- the -- the arguments on their collateral, the decoder that the Committee has built actually values the securitization trusts claims 36.5 per cent higher than they -- they're allowed under the settlement under the plan. If a trust -- if the trusts were to opt out of the settlement and everything else was going to be settled in exactly the same way, the trusts would come in and say, "We already know that you -- your decoder allows our claim 36.5 per cent higher."

If every trust did that and they came back and just took the same settlement on the lien issues, took the amount of their claim at 36.5 per cent higher, general unsecured claim holders are going to be down by about 2.6 million in estimated distributions to them. So there is a significant risk going forward on this as to how that litigation is resolved and whether creditors, all creditors do significantly worse.

So, Your Honor, today, First Marblehead is

objecting because it believes trading this bird in the hand for the -- the risk going forward is not worth it for the small amount of money that they are talking about, which we believe is probably already used up during this process.

Now if Your Honor does decide that this modification can move forward, then First Marblehead requests that creditors be provided with adequate and meaningful disclosure an opportunity to object. We have laid out a number of areas where disclosure is inadequate. I'll just touch on a couple of those here again.

First, Your Honor, is the issue of the cash. We have heard for the first time today that they may not hit this 36 million number. I think Mr. Glosband said that if the current plan is approved, they would only have at best case $200,000. So it appears that we've come somewhere from 80 million dollars of unrestricted cash at the beginning of this case all the way down to somewhere below 33 million. We're not sure. You -- you can't tell from the disclosure either what's in the current disclosure statement or anything here, where we're going to be at the end of the -- end of the day with this cash.

In addition, as Mr. Kapp pointed out, the financial projections are now quite old. They assumed numbers and estimates through April 30th and were built long before that. They seem to be outdated by -- by a long shot. In addition,

none of the disclosure explains that there are significant risks to unsecured creditors if the trusts opt out of this litigation and that they could do materially worse if the trusts opt out and litigate.

And there's no -- there has been no disclosure since -- as to the exact costs that this process, this -- or is taking upon the proceeding. No fee applications have been filed since November. We don't know where -- we -- you can, if you ask the debtor for operating reports get some sense of how those fees are accruing, but no one has any insight into -- to how much is being incurred. And so the question is, you know, if the debtor needed an extra three million of cash, we may have just seen it fly out the door through this process. We should at least have disclosure telling us where this cash is, where it's coming from, a detailed sources and uses and of where all the cash is coming from, where it will go on effective date.

Perhaps if that had been in the first disclosure statement, they would have recognized that there was a 6.2 million missing somewhere. But -- but it seems only reasonable now if we're going to go down this process again, that that level of disclosure be provided so that we don't have to come back here again and find that something else was missed, and that there's not enough money to get this done.

In addition, Your Honor, as I mentioned, there is a

number of just false and misleading disclosures made regarding my client, First Marblehead. Regarding the data, we stand ready to produce everything that we've provided in the reply. We believe they have everything they need. We're at a loss. We just don't know how else to help them. They just need to call and -- and tell us.

In -- in addition, Your Honor, with respect to the amounts of their disputed loans, the amounts of their recoveries, this is all data they have for some reason in their disclosures they want First Marblehead's statements regarding what First Marblehead thinks about needs be in there. First Marblehead has no position regarding the amounts. Those -- That's information in TERI's hands.

And with respect to the disputed recoveries, there's some suggestion that First Marblehead provided incorrect reporting. This is not the case. The reporting with respect to that 6.2 million has been in TERI's hands since 2006, and as we understand, pursuant to their trust orders, should have been maintained throughout this proceeding. It just isn't an issue with First Marblehead, and we're not sure why they continue to -- to make false statements regarding First Marblehead's involvement with this data.

And so, Your Honor, again, with respect to those disclosures regarding data, we'd ask that those be corrected

as well.

In -- in conclusion, Your Honor, First Marblehead does believe that this plan adversely affects all creditors. We would request that -- that the order be entered confirming the plan, that it go forward on the -- on the basis it was confirmed by all the creditors, but if -- if this Court is willing to move forward on modifying it, there is an enormous amount of disclosure that should be provided so that we aren't here again having missed something else that -- that they may not know about now, and -- and we need disclosure to ensure that. And that's all I have, Your Honor.

THE COURT: Thank you. Mr. Martin did you want to -- or,, Mr. Samson?

MR. SAMSON: Thank you, Your Honor. Thank you, Your Honor. Paul Samson of Riemer & Braunstein for RBS Citizens, NA.

RBS Citizens is one of, I think, the second largest lender in this case as contrasted to the trust which we agree are also large. We are holding approximately 1.33 billion of student loans as of the petition date and the various programs. We also held a substantial amount of collateral, approximately 45 million in the pledged accounts, and because we were partially secured, although invited, we did not serve on the Official Committee of Unsecured Creditors.

So we were not a plan proponent. We had our own

issues. We negotiated extensively with both TERI and the Committee, as the Court knows, with the first stipulation that was approved at the April 28th hearing. We are here today to support the Committee and TERI in its motion to modify the fourth amended plan.

We note, for one thing, that we would agree with the Court's suggestion that without a confirmation order, there is not an official confirmation. As the Court knows, confirmation tends to be a final order, and you can't very well appeal confirmation until there's a confirmation order entered.

Also, the Court does have broad discretion to modify, to change it's mind, to -- once it sees the draft 40-page order -- to have additional hearings until such time as the order is entered; and until the final order is entered and the wording established, there's no confirmation *per se*, although everyone was here on the 28th, and everyone heard the evidence and -- and heard the Court, it's still not formally confirmed until an order is entered, and it's more than a mere formality.

Indeed, if the Court finds out that some basic assumptions, which appears to be the case here, there's a huge disagreement on, one, the assumptions as to what the plan means, and, two, the proponents saying, "We made a big mistake," that would be grounds for the Court to reconsider

its statements on April 28th and say, "Wait a minute, we want -- I want to hear some more evidence on some more points before I finally make up my mind."

One thing that was telling in the discussion today is that the objecting parties, although there was talk, "Yeah, we had an agreement, and we always understood our agreement to be this and that," what was telling is, none of the objecting parties said, "And we specifically agreed with the Committee and TERI that these monies were going to go to the trusts."

And I infer from that that it never happened, and I infer from that that -- and -- and we've, obviously, made discussions with -- with TERI and the Committee, that TERI and the Committee never ever intended that to happen, however one may be able to interpret the wording today. And, you know, perhaps I was not as astute as I should have been in advising my client, but I can tell the Court that when we saw the definition, "securitization trusts collateral," we assumed that it was implicit that this -- these were assets, that the securitization trusts had a valid claim that they were collateral.

I think it's very telling that Ambac's attorney acknowledged that they never claimed that they had collateral. We had collateral, we're paying about 2.3 million dollars to settle a lien dispute that we've had with

the Committee and TERI, and we would have been very troubled had we known that there was an argument based on the definition of a securitization trust, that something that was not their collateral was going to be paid to them in addition to the collateral, and we may have reconsidered our vote, or at least we would have had a discussion with the proponents like, "What's going on here? What's your justification for doing this?" Of course, they never intended to do it. So we never have had that discussion with them.

But, you know, the disclosure statement, if the objecting creditors' arguments are correct, the disclosure statement may have been deficient, too, because it should have been disclosed then to people like my client that they're getting collateral that they never had a claim to, and I'm not even sure that would be appropriate, Your Honor. Certainly it should have been fully disclosed and elaborated on, and -- and, again, since we know there was a mistake, there was nothing to disclose because the proponents thought otherwise.

I -- we are a little troubled by some of the veiled threats that we're hearing. I mean, the -- the plan -- the Code process for voting and confirming on a plan is to have the proponents propose the plan, you vote, you object, and so on. To make an argument to a Court that, "We're going to make it cost more to not agree with us than it will cost if

you *do* agree to us," is -- is not a jurisprudential argument, Your Honor. It's -- it sounds a little bit like a got-you argument.

And, and I agree with the Court's suggestion earlier that this thing can be totally analyzed, and I'm -- I'm not suggesting that anyone was acting in bad faith when all this came up, but it -- it is getting down to a "Got you; we're going to cause trouble if you rule against us," as opposed to, "Yes, everyone made a mistake, it's very clear." Our client made the same mistake, I can tell you, and I did, too, that the Committee and TERI made, we interpreted that differently. So we would request the Court to allow the motion to modify the plan. Thank you.

THE COURT: Thank you.

MR. MARTIN: Good afternoon, Your Honor. Ross Martin, Ropes & Gray for The Nellie Mae Education Foundation.

Your Honor, Nellie Mae is not the largest creditor in this case, but listening to the folks today here, I think we might be the largest creditor who's here who hasn't been involved in any of this, and I think that gives us an interesting perspective. We filed a very short objection about a day before some of the larger ones were filed, which essentially says we really don't quite understand what's going on here, we don't understand the cost of benefits, and I will -- based on the debtor's initial motion filed about a

month ago, and so we followed the back and forth of the papers and the -- the numbers and -- and the statements today with some interest.

And I'd like to -- I'll be relatively brief, but I'd like to make some observations about on how we see some of these arguments back and forth because I find myself agreeing with some of the things my brother Mr. Glosband says, and I also find myself quite sympathetic to some of the things being said over here, but I also have a concrete suggestions to move this process forward because it's -- it's not necessarily in a great place where it stands today.

So, first of all, for whatever it's worth, I think we completely concur that the plan is not confirmed. I think that's very straightforward. I don't think any of us here would advise clients to pay money to buy assets in a 363 sale until an order is entered on the docket, I think that's very clear as a matter of law.

On the other hand, I found Ambac's argument about their position quite compelling. As a matter of fact, they negotiated a deal three times here, and they're being told now at the last minute that they're going to have to give up a lot. And that doesn't mean necessarily the debtors don't have the right to do it because I think they *do* have the right to modify the plan. But giving where we are, starting with a fourth amended plan, I think the Court needs to

seriously consider what the process is and the remedy isn't forcing the plan down the debtors' throats. I just don't think the Court can do that. But we need to think quite seriously in light of Ambac's quite valid concerns about where this is.

Now the flip side of this a little bit is I hear Ambac saying, and frankly, First Marblehead, but I think -- First Marblehead as well, but I think Ambac is a -- is a better example here -- that they need more information, that there should be more disclosure. The debtor is completely right here. No matter what they say at this table in the new disclosure, these folks are going to check it.

It really doesn't matter from the disclosure perspective what -- what gets said here now. We should talk separately about disclosure to everybody else in the world. Frankly, people like my client, and people that -- the disclosure that's going to be passed back to the note holders, but for the principal to objectors here, more disclosure is frankly not necessary at all. If there's something they don't know, they can ask and get it.

Now, I think that is critical. It goes to something that has not been observed here today that occurred to me as I was sitting here. There's something that's not -- that's implicit in the original disclosure statement that maybe is the most important thing about that disclosure

statement, and that's that when the disclosure statement before the fourth amended plan went out, everybody knew that Ambac, the largest creditor, the one creditor who, if they didn't like the deal, had the capability to actually litigate the decoder issues and the trust adversary issues. They've got enough at stake, being in the 13 of the 17 things, okay.

The solicitation of a plan under these circumstances, which is a huge settlement trying to get everybody on board, is totally different with Ambac on board to start with where they don't need to say anything, and if they're starting in a place where Ambac is not on board because all the other trusts are going to go along, they're not going to want Ambac to get a better result than any of them, and under this plan remember that there's a most favored nations clause. This was highlighted at the confirmation hearing. If Ambac litigates and wins, everything changes. All the numbers change.

Now when they originally sent this out, they knew Ambac was on board. And I suspect, it's not actually in the disclosure statement as far as I could tell, I re-read it quickly before the hearing, that they were highlighting that, but they knew that, and I bet there were lots of discussions behind the scenes with bondholders and everyone else that there very likely was not going to be litigation of these big issues. That is a critical piece of disclosure, that if this

plan is going to be modified, frankly, creditors need to know whether it is likely that Ambac is going to litigate, because First Marblehead says there's going to be a lot more cost on both sides, there could be totally changed results, people could decide that they don't want to join because they want to go along.

This Court directly asked, "What are the adverse changes?" One of the adverse changes might be getting stuck, you know, having accepted, but with Ambac still litigating. Nobody raised that here today, but that seemed to me to be a very important potential adverse effect on all the creditors, not just Ambac, not just First Marblehead, not just the trusts.

So a suggest that we frankly have arising out of this, Your Honor, is that we might be almost there, the debtors certainly have the right to modify their plan, as I said, and might be almost there; but frankly before this process can go, we need to know whether Ambac's on board, just like we did the first time.

Now that might, at first blush, when I realized this a couple of days ago, seemed like Ambac has all the cards. I'm not so sure, Your Honor. It's a lot of money, but it's not that much money. Ambac, itself, not a month ago, two months ago, entered a rehabilitation proceeding in the State of Wisconsin. It's not clear to me that they're

going to approve the expenditure of millions and millions of dollars to litigate all this.

I found very intriguing one sentence in their objection, and I'd just like to point to it, if I can find it, because I found it quite telling. They've written a very long objection. What they say on page 30, and I -- and in fairness to my brother, I'm picking one piece out of his pleading, but I -- just using this as an example, he says at the very bottom of the page,

> "It is hard to dispute that such a significant reduction in their recovery would not prompt the master trust to at least reconsider its acceptance of the modified plan."

That is a lot of words to say "maybe," but I'm not sure yet. They can get all the information they need, they should talk to the debtors, they can -- they're going to check it all anyway, and we all need to know whether we're just going to be back here at the end of August at a huge cost and expense because Ambac's rejected the plan, when we can find that out in advance, and we should find that out in advance. We knew last time in advance, and that was very critical.

Now the third observation that I have, Your Honor, is as to this accounting and the segregated accounts which I thought I understood, then I didn't think I understood when I saw the reply brief of the debtor, and now I think I

understand even less. This is the -- now what is supposed only $500,000 over something related to court costs, and I'll be the first to confess, Your Honor, I don't fully understand it.

What I do know, Your Honor, is that when they filed the current modification a month ago, almost to the day, whatever the problem was with the accounting under a prior court order that they were supposed to do pursuant to an order of this Court was going to cause a hold up of essent -- some huge amount of cash because both the objectors pointed to that. Now in the reply brief it's less, and since the reply brief it's even worse.

I hope, and it's probably very likely, because I'm sure the professionals here and -- and Mr. Renzi and Mr. Peko have taken their look, that that's right, in which case it's not a material change, but the notation that without any other disclosure here, without any more report to this Court that we've gone from a pleading that they filed, and a modification that they filed a month ago that said they needed to hold up all the hundreds of millions of dollars of distributions, it's only $500,000 today, they actually haven't changed the plan yet to reflect this latest, "we're only holding back -- it's only -- it's only a half million issue," whatever that is. It's not fully changed as far as I can tell.

But it seems to me that this is an issue -- I'm not proposing that the process be blown up over this whatsoever. I'm simply saying that there needs to be some more disclosure and report to this Court before we go off. I mean, what we have, Your Honor, is this. This is the chart, this is the Exhibit F, this is what creditors is going to re -- they're proposing that this piece of paper is what creditors read, plus 200 pages of back and forth between these folks. That's not disclosure. Disclosure, I've been in cases, it may have been in this court years ago, but they can do some kind of supplemental five-page, ten-page, they can make it clear, the -- the back and forth is not going to help anyone understand what was going on.

And the last point I'd like to make, Your Honor, is the cost and benefits really do have to be weighed here. I found it notable in the -- that in the debtor's reply brief there was essentially no response to First Marblehead's points that the valuation that they're using to justify the benefits, that is, the valuation that produces these numbers that they say makes it only adverse to three trusts, is not the same as the decoder. If -- look, if it's not the case, it's not the case, but if they're using one set of valuations to -- to justify the plan and all the findings this Court previously made, but another to justify that the adversity, that's a real problem.

Secondly, there is no response to the fee issue. Whatever the fees are in the case today, we don't know what they are from November to now, and we don't know what they're going to be going forward if Ambac opts out and everybody else opts out. Those are very real issues.

So, Your Honor, in sum -- and, again, you know, maybe -- maybe we're in a little bit of a unique position and maybe the Court will just disregard us because we're not in the midst of these negotiations, but I really do fear if we're going to be back here again, either with a plan with very large creditors who are *not* on board -- and we could have known that in advance -- with the Court imposing some kind of structure on this process; or as First Marblehead suggests, it's just not clear to me at all that there's really a net benefit at the end of the day. If the valuation is lower and the costs are higher and anybody opts out and litigates, this cash is gone.

And they're right, one of the big places it's going is to reorganize TERI. It is what it is. The Court has made its findings on that. I've been heard on that issue before. But this is not, this one page and 200 pages back and forth is not disclosure to anyone, I couldn't make heads or tails with.

So my suggestion, Your Honor, is that we have some kind of process that gets these folks together and gets it

negotiated. Ambac may say they're going to opt out and these folks can say Ambac is never getting its money. I mean, they -- they need to get that worked out, just like they had it worked out before. Thank you, Your Honor.

THE COURT: Thank you. All right. Mr. --

MR. GLOSBAND: Yes.

THE COURT: -- Glosband?

MR. GLOSBAND: (unclear)

THE COURT: Briefly.

MR. GLOSBAND: Thank you, Your Honor. I will try to be brief. I'll start by saying, and I'll do it in order of the parties.

I agree with Mr. Kapp, that Ambac is not a bad guy, but I would note that things aren't quite as clear in the documents in addition to -- in today's presentation, as some of our friends would pretend they are, and so, for example, and I'll try to cut through this.

The -- the clarity with respect to the list of loans on Mr. -- which Mr. Kapp relies is inconsistent with Schedule B to the plan, which has the numbers in it, which says what they're getting, and which says what they're getting in terms of loans are those purchased at a pledge account collateral. So you have a yin and you have a yang on that issue.

In addition -- and maybe I'd digress a bit what Mr.

Martin just said, it wasn't said in the disclosure statement that Ambac was accepting the plan, and so it's hard to see how anyone could have relied on Ambac's acceptance, at least if they were relying on the disclosure statement. Ambac wasn't in the plan on those terms at that time. So it simply wasn't there.

On some of the cases, without getting into the case-by-case refutation, the two cases that Mr. Kapp relied on to say the Court must confirm the plan, the ***Rickle*** case and the ***Antiquities*** case, and it said the Court can't modify the plan, both of those cases came up after the plan had substantially consummated, in fact, years after when parties had, in fact, changed their positions, as they do in substantial consummations. So those just aren't supportive of his point.

As to whether or not the plan is workable, and there's no fault of the plan proponents as a condition to modify under 1127(b), first of all, I would say we're not under 1127(b). And second of all, I'll be darned if I can find that in the case that he cited it at the page that he cites, or anywhere, for that matter. I mean, what we have here are the circumstances that I've described earlier.

In terms of the cases that say we need to start over with the disclosure process, and the rather assertive statements that there are no cases ever where there was an

adverse effect found where a court didn't force a full rediscloseure, well, we did cite those cases and we discussed them. I would refer to the ***Simplot*** case in our material because that's a convenient source of all the other cases discussing that point in which the Court found that the disclosure was tuned for the circumstance, and if the parties affected by the adverse change were sophisticated and involved, there was no further disclosure required, that there's no further disclosure required to parties who aren't adversely affected.

So there is authority that way, and with all due respect, and I know you'll be disappointed, you won't be the first if you -- if you go in that direction.

With respect to the U.S. Bank presentation, again, we heard about how black and white and clear everything was and, all of a sudden, now the plan might not be feasible, we say, if it's confirmed as written -- as interpreted by them. Well, there's more to it than just the cash component and whether or not TERI gets cash for some new business, and there are two points, and I might sort of blur with my objections to try to save time.

One is that TERI is not only embarking on a new business, TERI's got a two-year contract to collect loans for the Committee, an issue made much of it at the last hearing by Mr. Martin. If TERI doesn't have any cash other than its

restricted charitable funds, it can't do that collection business. In that regard alone, the plan is not feasible. It's also not feasible from the perspective of TERI attempting to -- to generate a new business.

In terms of, you know, the overview of things, we've sort of heard from, except for Mr. Samson, one perspective of how adversely this affects how many people, and I would point to the plan itself and the fact that there are approximately 44 classes in that plan; and as of today, subject to the right of a couple of them to change their votes, all of them accept it.

Based on the modifications that we've filed, we believe three classes would be adversely affected and they can change their votes, even if it's all 17,and we've said we'd submit it to the 17 securitization trusts, there are 17 out of 44. You still have by number of classes overwhelming acceptance of this plan if they all change their minds, and it's, (a), hard to see why they would; and, (b), we would reserve the right even if we allowed them to vote to argue that only the three that were adversely affected should have votes that count if they change their votes.

Everybody is projecting on that side of the room on *horribles* about all of these classes changing their votes, and all of them choosing to litigate, and all of the costs therefore escalating out of control, but I think that's

perhaps an unrealistic speculation, and I would only refer the Court to the list that was Schedule B to the original plan and the pledge account balances. I mean, for example, we've heard a lot of speculation about what Ambac might do. Well, Ambac is the control party for three trusts. Under the original plan, one of those had a significant unsecured claim, the Master Trust, and its claim as adjusted for the settlements was 5.9 million dollars out of more than 300 million dollars in claims in the case.

The other two trusts didn't have claims because on the decoder calculations, they had equity. On the other hand, those two trust have between them about 130 million dollars in pledge account collateral. It's rather hard for me to see why they would change their vote and get into a situation where they're going to litigate and delay the ability to realize 130 odd million dollars of budget account collateral. So I can't say what they're going to do, but I'm just thinking the logic as I heard it was not the logic as I would certainly think about things.

The other point I'd make, and it sort of transcends both the First Marblehead and the U.S. Bank objection, with respect to the 6.2 million dollars in cash, it very deftly presented, I thought, of Mr. Jenkins to make it sound like we're taking that money out of their pockets; but it wasn't exactly how it was structured, presented, how the plan was

negotiated, and how the evidence was presented to the Court. Instead, what the Court had and what all the parties had was the best interest to creditors test. And in the best interest to creditors test, it's a line item for restricted cash of 364 odd million dollars that's going back to the plan trust.

That line item has within it the three million or so dollars that we thought was going back. (unclear) a separate line item. And the remainder of the funds in the segregated account. So if anyone on that -- in that constituency were to look at what was in the disclosure materials, and no one objected to the disclosure materials on that basis, they would have said, "All right, I'm getting my share of 364 million dollars, and I know what my pledge account balance is because I can see that on the list, the rest of it is a number that's going to be allocated, I'm going to get something more, I don't know how much more, I'll find out, I guess, later."

But no one was intent enough about that particular piece of accounting and it's unfortunate, but no one was intent enough about that that we actually laid out line item by line item that allocation. In response to what I've heard today, perhaps it *would* be a good idea to supplement disclosure with that, and we're, you know, perfectly willing to do it, but it's sort of not appropriate for there to be an

impression created that people were relying on getting that particular amount of cash. In fact, there was no basis for understanding what amount of cash there was; and, in fact, we thought the amount of cash being distributed in that category was at that point in time around 11 million six. It's now grown to 16 million six because of additional collections. But we also thought that it didn't include another 6 million two that was retrospectively calculated, and if you'll pardon the expression, was presented to us and what I would characterize as -- as sort of a last minute sneak attack, but I'm trying to stay out of recriminations and characterizations; but we do feel a bit put upon by the process.

And I -- I don't know that I need to respond to the specific inquiries that I'm alleged with having received with respect to the 6.2 million. I was asked about whether money had been set aside from the segregated account, and my answer was, "Yes. I don't know what the numbers are, we'll ask the company." By the time of the disclosure statement or the confirmation hearing, that issue had not been definitively resolved between the parties. It was not a matter of anybody affirming or denying anything. It was a, we're still working on allocating those numbers and the issue was not pressed hard by anyone.

So I'm really trying to just respond to what I

thought were the key points and clear up a couple of possible mis-perceptions from the way that matters were presented.

I guess I'd come back to saying, if only three trusts are materially adversely affected, and I think that's the case, then those three get to vote. If they decide to opt out, you know, the answer is the plan has a mechanism for every trust to opt out, and that nowhere it says in the disclosure statement that anybody has opted in or opted out at that point in time.

If they opt out, what has to happen is that their decoder claim gets determined by some other method. That method might be litigation, it might be truncated litigation in the form of estimation, it might be negotiation, who knows? But they might not opt out either. So -- so to wait the decision in this case on the prospect that everybody is going to opt out I think is unrealistic because they're not. I really don't think anymore than three ought to have a chance to opt out, but as I said before, we'd go through the process and let the others vote, and reserve that issue for -- for later.

The last point I'd make is that with respect to some of the suggestions on disclosure -- and I, not that I always just agree with Mr. Martin, but he is correct, he's not someone who's been involved in this process. If there are some parts of this that would benefit from, you know, a

condensed disclosure presentation, like an updated cash number, like a statement of the fees that have accrued, and I would on that point, by the way, say there aren't any secrets here, everything is in the operating reports and the operating reports are available to anybody who asks for them; but in any event, we could put that into a single piece of paper, if that would be -- would be helpful, and it really depends where the audience is. If the audience is the three folks we're talking about, those three trusts, they either have everything or are going to have it in a second. If it's broader than that, then sure, we can do, you know, a bit of a supplemental disclosure.

But I see no reason in this situation that we should start the process over, other than to defeat the process, which I think is the reason that that suggestion has been made.

So I will -- I'm going to close where I started, and that is, I wasn't happy to have to come in with this presentation at all today. I'm not any happier than I was when I started, but I do think that we have appropriately made the point that we're entitled to modify the plan. We need to modify the plan. There's no improper motive in our seeking to modify the plan.

Modifying the plan affects really three classes of securitization trusts creditors, at worse, 17 classes;

doesn't affect the other, whatever the difference is between 44 and 17, 27 -- you know, classes of creditors.

I guess the other things I could offer is if it were -- if the parties thought it would be beneficial, we can update the best interest trust and all of these things are things that are done, we're just, you know, happy to put it all in a little package and -- and include it. We can update the projections. I mean, all of that is -- is relatively straightforward. We just didn't really it mattered to anybody's decision. If people think it does, we're happy to accommodate. Thank you very much.

THE COURT: Thank you.

MR. SAMSON: I'll be very brief, I promise. I just want to clear up one point.

There were suggestions made that we proposed a process to go solicit changes of votes where we're requiring people to do things that are either inconsistent with the prior orders you entered, or inconsistent with their contractual arrangements between themselves.

I just want to clear it up. We're not requiring anything. We have proposed as an accommodation of process. If they think that process is deficient, they're free on notice to us to tell us, "Thank you, but no thank you, we'll take care of that ourselves." Just like when we go to Citizens Bank, we don't go and solicit the Board of Directors

and shareholders of Citizens Bank, we're not required to solicit the bondholders of the trust. If we're doing it in a way which we think is cost effective and conforms with 1127, but they don't like it, the answer isn't, "We'll go back to the robust process we had before that cost a lot of money and took a lot of time." The answer is, "Fine, you -- you can handle it yourself, we're not preventing it."

So it's not correct. we're not forcing anybody to do anything.

With respect to disclosure, the real concern, Your Honor, whatever process you order, it be one that's correct. I think the one thing everyone agrees on here is we need to get the plan confirmed quickly. Certainly on the five specific points that have been raised by Ambac, the cash, you had an affidavit of Mr. Peko at the last confirmation hearing, presumably you'll have another affidavit at another confirmation hearing that will provide the same information, if it -- that affidavit was sufficient form of disclosure before, there's no reason to think it wouldn't be sufficient now.

Second, Ambac wanted assurance its pre-petition loans would be maintained, that -- that the plan says that, they will be maintained; and if they've got specific details on that, they -- we've asked them to let us know and we'll trying to accommodate them. We -- we haven't gotten a

response yet about what the details about. The mechanism of maintenance is particularly troublesome, but we're agnostic. If we can work something out that isn't over costly, I -- I don't see that as an issue.

The chart on page 14 should be updated. I suppose we don't have an objection to updating the chart and including an updated chart. The contentions about First Marblehead they say are unsupported. Well, you know, they are what they are. They responded fully.

And five, understand the point of the exercise. 1127(d) talks about changing votes. The people who get a right to change the votes are the people who are objecting. The disclosures measured against what might be required, if we were going out for the first time with the whole body, we might be doing something very different. But for the purpose -- fit -- it's fit for the particular purpose, Judge. Those that get to change their votes have sufficient disclosure. Thank you, Your Honor.

MR. PEDONE: Your Honor, if I may be heard briefly? The plan proponents have ignored their burden. Their burden is to prove that they can come here with a feasible plan that will go out.

Part of the burden with a plan that proposes a settlement is that the counter-party to the settlement is accepted. Mr. Sternklar has just stated that plan proponents

are not willing to use procedures that result in an acceptance of the settlement. That's a concession that they could end up with litigation with 17 trusts, and that's a plan that won't be confirmed.

I would submit that, in effect, without committing to the procedures with changes that are as material as they are proposing, they are, in fact, under Section 14.5 of the plan in withdrawing the old plan, and that we need procedures that allow for the process to go forward -- go forward.

Finally, with regard to disclosure, 1127(c) without regard to what any cases not similar to this say, is the black letter law. Thank you.

MR. KAPP: (Approaching microphone; unclear) Your Honor, just one (unclear). I asked him to make it and he didn't. J. Kapp for AM -- Ambac Assurance Corporation.

The only point I wanted to make is, Mr. Glosband changed the procedures on us again, and now I'm confused. His -- his motion said -- his reply said that all the securitization trusts would get to -- to re-vote. He's now said that, "Well, we -- we'll reserve it for later." Well, that's not the same thing. So I'm, once again, completely confused. But I just note that he -- he's changed what he said from the beginning, and I just wanted to point out that inconsistency. Thank you, Your Honor.

THE COURT: Thank you. All right. I -- I find

and I rule that the settlement with Ambac in the securitization trust it represents was a foundation and extricably intertwined with the material provisions of the fourth amended plan.

It's clear to me that with the interpretation that is now being preferred by the plan proponents advanced or understood during a negotiation between Ambac and the plan proponents, the present settlement would likely not have been agreed to, and either negotiations would have continued to meet Ambac's concerns resulting in a different plan structure or a different plan treatment, or the plan proponents would have adopted a more litigious approach in their plan presented to the Court as -- as to Ambac.

In any event, history cannot be rolled back, and it is now too late and decidedly inequitable to preserve some elements of what has been described as a settlement and change others.

In any event, the Court rules, as it indicated it was inclined to do at the outset, that the fourth amendment -- fourth amended plan was not confirmed.

Furthermore, for the reasons that I've just set forth, that plan is not modifiable.

Accordingly, to the extent necessary, I -- and I'm not certain it is, I alter and vacate the conclusions I reached on April 28, 2010 and now -- now find that the fourth

amended plan is not confirmable under 1129(a)(2) and/or (a)(11). The plan proponents' motion to modify the plan is denied.

The debtor is ordered to file a fifth amended plan, a further amended disclosure statement, and motion to approve same on or before August 27, 2010.

Now the order I've just entered -- I just issued, which will be entered, is itself alterable. If the parties within a relatively short period of time decide to sit down and avoid the mutual -- the mutually assured destruction, which is the path on which they're traveling, then maybe we can get back to the fourth amended plan with some modifications; but absent -- absent a resolution, I look forward to seeing a fifth amended plan on or before August 27. Thank you.

MR. SAMSON: (unclear)

THE COURT: Yes, sir.

MR. SAMSON: (unclear) a matter of time?

THE COURT: Oh, yes. I apologize. Well, are they dependent -- They're not dependent on the -- on the confir -- on the viability of the plan?

MR. SAMSON: I do not believe that ours is.

THE COURT: All right. Well, then I'll hear you. Thank you.

MR. STERNKLAR: Judge, can we (unclear) ten minutes

to talk to (unclear) the issue you just raised is (unclear) needs to be discussed.

THE COURT: You think maybe -- maybe not so much?

MR. STERNKLAR: Maybe not.

THE COURT: All right. I'll come back out in ten minutes.

MS. MARTIN: And, Your Honor, --

THE COURT: Yes.

MS. MARTIN: -- one other, I think that the TCF stipulation was a motion to change a vote of the fourth amended plan, so --

THE COURT: Sounds moot to me.

MS. MARTIN: Right.

THE COURT: Okay.

[Off the record at 4:12:34 p.m.]

* * * * * * * * *

[On the record at 4:40:48 p.m.]

MR. REYNOLDS: All rise.

THE COURT: Please be seated. So the question was whether the settlement with Citizens was still alive, still relevant?

MS. MARTIN: Yes, Your Honor. We don't believe that the settlement was -- with Citizens is dependent on any plan of reorganization. Rather, it's like the other -- or it's most -- it's more like the other sort of one off deals

we have done with some of the other large lenders in this case.

Although there was a provision regarding support of the modified plan, and while we try and sort out what that means, what we'd like is a very brief continuance, like a one-week continuance, just to make sure that we modify that provision of the stipulation appropriately.

MR. SAMSON: Your Honor, we indicated that that's agreeable with us, give them a slight continuance.

We -- we do also agree that it's independent of what happens with the plan, but we did say we'd support A fourth amended plan which no longer exists. So there's no need to talk about the fifth amended plan. And there were two pieces of this. The -- getting back to the pledged collateral that's been frozen for two and a half years, and agreeing on the claim --

THE COURT: Well, you can have -- (pause) -- hold on a moment. You can have this Thursday at two o'clock, or August 5 at two o'clock, both in the video conference suite in Boston.

MR. STERNKLAR: (unclear, not near microphone) can we work something out (unclear) this Thursday?

(Pause -- low-voiced conversations)

THE COURT: Or I could go out further, if you'd like.

MS. MARTIN: No.

MR. SAMSON: No, please don't.

MR. STERNKLAR: Our -- Your Honor, Jeffrey Sternklar for the Committee. We'd prefer August if -- if it's acceptable to Citizens.

MS. MARTIN: Okay.

THE COURT: August 5, two o'clock, video conference suite in Boston.

MR. SAMSON: Your Honor?

THE COURT: Yes.

MR. SAMSON: There were no objections filed, if we can -- ??

ATTORNEY: I'd like to address that, Your Honor.

MR. SAMSON: If we can all agree on the wording, can we just submit it to the Court?

THE COURT: Well, subject to what your brother is about to --

ATTORNEY: Well, Your Honor, I was about to --

MR. SAMSON: (unclear) he had the stipulation and the whole deal in front of him and so (unclear)

ATTORNEY: Sir, I let you spoke on my motion and you didn't object.

MR. SAMSON: We both had --

ATTORNEY: Would you offer me the same courtesy?

MR. SAMSON: I'm not --

ATTORNEY: Thank you. Given what we've just heard, I think we need to look at -- take a look at their settlement; and in light of the fact the plaintiffs are going forward, I would ask for is that (unclear) being kicked to August 5th, give us -- we would ask for an objection for -- deadline for a week to take a look at it if there's a problem.

I'm not anticipating there is, but to be quite honest with Your Honor, Your Honor, given everything that's happened, I think it deserves a fresh look other than the 15 minutes for folks just talking to the Clerk.

THE COURT: Well --

MR. SAMSON: And, Your Honor, my response would be, Ambac certainly is entitled to reserve all rights, but we -- we filed the first stipulation on April 22, we filed the second stip -- there's nothing hidden.

THE COURT: Well, here's -- here's I think the appropriate way to deal with that. If the only change is going to be the deletion of the agreement to support the fourth amended plan, or the substitution of an agreement to support whatever treatment is identical to the treatment that was received in the fourth amended plan, if that's -- if it's either of those, then as far as I'm concerned, Ambac has waived its rights, and I'll allow that upon receipt of action.

If, on the other hand, there's something more than when I -- when we get it, we'll set it for the -- for the 5th at two o'clock. Okay?

ATTORNEYS: Thank you, Your Honor.

(End at 4:45:47 p.m.)

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I certify that the foregoing is a true and accurate transcript from the digitally sound recorded record of the proceedings.

/s/ *Gloria C. Irwin* 7/18/2010

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GCI TRANSCRIPTION SERVICES
210 Bayberry Avenue
Egg Harbor Township, NJ 08234-5901
609-927-0299 1-800-471-0299
FAX 609-927-9768
e-mail irwingloria@comcast.net
✔SC-SG